

No. 11661
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HOME INDEMNITY COMPANY OF NEW YORK,
Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY
OF DETROIT; GEORGE WHITE; JAMES CARL
FITZGERALD; JAMES RICHARD OSBORNE;
MICHAEL LEE and PATRICIA LEE,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 234, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

THOMAS P. MENZIES
HAROLD L. WATT
1014 Fidelity Building
548 South Spring Street.
Los Angeles 13, Calif.

For Appellee Standard Accident Insurance Company of Detroit:

JONES, THOMPSON & KELLY
1017 Rowan Building
Los Angeles 13, Calif.

For Appellees Michael Lee and Patricia Lee:

WILLIAM GUTHRIE
JOHN B. LONERGAN
DONALD W. JORDAN
506 Andreson Building
San Bernardino, Calif.

For Appellees James Carl Fitzgerald and James Richard Osborne:

EDGAR B. HERVEY
1204 San Diego Trust & Savings Building
San Diego 1, Calif.

For Appellee George White:

EDGAR A. LUCE
1220 San Diego Trust & Savings Building
San Diego 1, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

Home Indemnity Company, etc. vs.

In the District Court of the United States
Southern District of California
Central Division

No. 5729-OC In Equity

STANDARD ACCIDENT INSURANCE COMPANY
OF DETROIT, a corporation,

Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK,
a corporation, GEORGE WHITE, JAMES CARL
FITZGERALD, JAMES RICHARD OSBORNE,
MICHAEL LEE and PATRICIA LEE,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

For cause of action plaintiff alleges:

I.

That this court has jurisdiction over the above entitled action by reason of the following facts, the particulars of which are hereinafter more fully alleged: a diversity of citizenship exists between plaintiff and each of the defendants, and the amount involved in this action is in excess of \$3,000.00, exclusive of interest and costs of suit.

II.

That the plaintiff is now, and at all the times herein mentioned was, a corporation organized and existing under and by [2] virtue of the laws of the State of Michigan, and was and is a citizen of the State of Michigan, and is now and was at all times hereinafter mentioned

authorized to do business in the State of California and to write policies of automobile liability insurance in said state, and was and is actually engaged in the business of writing said policies within said State of California at all of the times hereinafter mentioned.

III.

That the defendant, Home Indemnity Company of New York, is now, and at all of the times hereinafter mentioned was, a corporation duly organized under the laws of the State of New York, and is and was at all of the times hereinafter mentioned a citizen of the State of New York, and is and at all times herein mentioned was authorized to and actually engaged in business in the States of Nevada and California, and authorized in said states to write policies of automobile liability insurance.

IV.

That the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, and each of them, are now and were at all times hereinafter mentioned, residents and citizens of the State of California, residing in the Southern Judicial District of said state.

V.

That plaintiff is informed and believes, and therefore alleges, that the North Lumberland Mining Company, a corporation, hereinafter mentioned, is, and at all times hereinafter mentioned was, a citizen and resident of the State of Nevada, and is not within the jurisdiction of this court, and for that reason has not been made a party to this cause.

VI.

That by reason of the facts hereinbefore alleged there is a diversity of citizenship between plaintiff and all of the [3] defendants above named.

VII.

That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

VIII.

That plaintiff is informed and believes, and upon such information and belief alleges, that on and prior to the 20th day of July, 1946, the aforesaid North Lumberland Mining Company was the owner of a certain Lincoln Zephyr automobile, and that prior to said 20th day of July, 1946, the exact date being unknown to this plaintiff, the defendant, Home Indemnity Company of New York, issued in the State of Nevada to said North Lumberland Mining Company its policy of automobile liability insurance, which said policy was in full force and effect on the 20th day of July, 1946, and at the time of the accident hereinafter described.

IX.

That plaintiff is informed and believes, and upon such information and belief alleges, that said Home Indemnity Company of New York did, by the terms of said policy, agree that it would pay all sums, not exceeding \$100,000.00 for the injury or death of one person or \$300,000.00 for the injury or death of more than one person in the same accident, which said North Lumberland Mining Company, or any person using or operating said Lincoln Zephyr automobile with the permission of said North Lumberland Mining Company, should become ob-

ligated to pay by reason of the liability imposed upon them, or either of them, by law for damages on account of bodily injury or death at any time resulting from or suffered, or alleged to have been suffered, by any person or persons due to any accident as result of the ownership, use, operation or maintenance of said Lincoln Zephyr automobile; and that the said Home Indemnity Company of New York, under the terms of said policy, did further agree that it would, at its own cost and expense, investigate all accidents alleged to have [4] occurred as result of the operation of said Lincoln Zephyr automobile, and would, at its own cost and expense, defend and care for on behalf of each person assured under said policy all suits or actions at law brought as result of any such accident, even if groundless.

X.

That plaintiff is informed and believes, and upon such information and belief alleges, the fact to be that said policy of insurance issued by defendant, Home Indemnity Company of New York, as aforesaid, was substantially in the same form as the policy of insurance issued by this plaintiff as hereinafter alleged, which is annexed hereto and made a part of this complaint and marked Exhibit A, except that the amount of coverage and the name of the person named as assured and the automobile as to which said insurance was issued were different.

XI.

That on or about the 29th day of September, 1945, this plaintiff issued to the defendant, George White, in the State of California, a certain policy of automobile liability insurance, wherein and whereby this plaintiff agreed to pay, on behalf of said George White, all sums

which he should become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident arising out of the ownership, maintenance or use of a certain 1942 Packard five-passenger convertible coupe, not exceeding however the sum of \$25,000.00 for the bodily injury or death of one person, or \$50,000.00 for more than one person injured or killed in one accident.

XII.

That by the terms of said policy this plaintiff further agreed that if the automobile described in said policy issued by it to the defendant, George White, should be withdrawn from normal use [5] because of its breakdown, repair, servicing, loss or destruction, the insurance afforded by said policy with respect to the automobile described therein should apply with respect to any other automobile not owned by said George White while temporarily used as a substitute for the automobile described in said policy, but that by the terms of said policy it was further provided that such insurance as to the use of said substituted automobile should be excess insurance over any other valid and collectible insurance available to said George White under a policy applicable with respect to the substituted automobile or otherwise against loss covered by either or both of said insuring agreements; that a photostatic copy of said policy issued by this plaintiff is annexed hereto, made a part hereof, and marked Exhibit A.

XIII.

That plaintiff is informed by the defendant George White, and upon such information believes and alleges the fact to be, that on the 20th day of July, 1946, the Packard automobile described in the policy of insurance annexed hereto, made a part hereof and marked Exhibit A, was withdrawn from normal use because of breakdown or repair, and this plaintiff is further informed and believes, and upon such information and belief alleges, that on said 20th day of July, 1946, and while said Packard automobile was broken down and under repair, defendant George White was driving the aforesaid Lincoln Zephyr automobile, the property of defendant North Lumberland Mining Company, in the County of San Diego, State of California, with the consent of said North Lumberland Mining Company, and did then run into and collide with one Claude McLester Lee and one Leana Mae Osborne Lee, and as result of the injuries sustained in said collision said Claude McLester Lee and said Leana Mae Osborne Lee died.

XIV.

That the defendants, Michael Lee and Patricia Lee, did, on or about the 6th day of August, 1946, commence an action in the [6] Superior Court of the State of California, in and for the County of San Diego, entitled, "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian ad litem, Plaintiffs vs. George White, John Doe and Doe Corporation, a corporation, Defendants," being action No. 134918 in said court, and that in the complaint filed by them in said action they alleged that they are the children of said Claude McLester Lee and his sole surviving heirs-at-

law; that the death of said Claude McLester Lee was caused by the carelessness and negligence of the defendant, George White, in the operation of the Lincoln Zephyr automobile hereinbefore described, and that by reason of the death of said Claude McLester Lee they have been damaged in the sum of \$50,000.00; and that said action is now pending.

XV.

That the defendants, James Carl Fitzgerald and James Richard Osborne, commenced an action in the Superior Court of the State of California, in and for the County of San Diego, entitled, "James Carl Fitzgerald, a minor, by and through his Guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs vs. George White and North Lumberland Mining Company, Defendants," being action No. 134630 in said court, wherein they allege that defendant James Carl Fitzgerald is the son of the aforesaid Leana Mae Osborne Lee, and that James Richard Osborne is the father of said Leana Mae Osborne Lee, and that said James Carl Fitzgerald is the sole heir-at-law of said Leana Mae Osborne Lee, and allege that the death of said Leana Mae Osborne Lee was caused in the accident hereinbefore described by the negligence of defendant, George White, in the operation of the Lincoln Zephyr automobile hereinbefore described, and that he was driving the same with the knowledge and consent of said North Lumberland Mining Company, and allege that by reason of the death of said Leana Mae Osborne Lee said James Carl Fitzgerald has been damaged in the sum of \$50,000.00, and that said James Richard Osborne has incurred and been obliged to pay for the burial [7] of Leana Mae Os-

borne Lee the sum of \$500.00, and by reason thereof has been damaged in that amount, and that said action is now pending.

XVI.

That the defense of said actions No. 134918 and No. 134630 was, by the defendant George White, tendered to defendant, Home Indemnity Company of New York, and that said Home Indemnity Company of New York did accept the defense of said actions, and did employ an attorney, to wit, one Thomas P. Menzies, to defend each of said actions on behalf of defendant George White herein, but that said defendant, Home Indemnity Company of New York, does now deny any liability to defendant George White under its policy of insurance issued to said North Lumberland Mining Company, and refuses to further defend or cause to be defended said George White in said actions, or either of them. Plaintiff is informed and believes, and therefore alleges, that said defendant, Home Indemnity Company of New York, will refuse to pay any judgment that may be rendered in said action No. 134918 or in said action No. 134630 against defendant herein, George White, or to pay any part of any such judgments, or to in anywise perform any of the terms or conditions of the policy of insurance issued by it as aforesaid.

XVII.

That out of and by reason of the facts, contracts and transactions hereinbefore alleged and described, an actual controversy has arisen by and between plaintiff and defendant, Home Indemnity Company of New York, the plaintiff and defendant George White, and defendants Home Indemnity Company of New York and George

White, as to the rights and duties of the plaintiff and defendant, Home Indemnity Company of New York, concerning their respective obligations to defend, on behalf of defendant George White, said action No. 134918 and said action No. 134630, and in regard to the respective liabilities of the plaintiff and defendant, Home Indemnity Company of New York, to pay any judgments that may be rendered in said actions, or either of [8] them, against the defendant George White.

That this plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that the defendant, Home Indemnity Company of New York, contends that defendant George White, in reporting to it the accident hereinbefore described, denied that the Lincoln Zephyr automobile driven by him as aforesaid had collided with said Claude McLester Lee or said Leana Mae Osborne Lee, but that he thereafter admitted that said automobile had struck said persons and refused to verify answers to the complaints in said actions No. 134918 and No. 134630 submitted to him by the said counsel employed by Home Indemnity Company of New York, as aforesaid, and by which said answers said defendant, George White, would under oath have denied that the automobile driven by him collided with said persons; and that said Home Indemnity Company of New York contends that by reason of the facts last hereinbefore alleged said George White breached the conditions of the policy of insurance issued by it, as aforesaid, and that by reason of such breach it has been excused from the performance as to George White of its obligations under its policy of insurance issued by it as aforesaid, and is not obligated to defend said actions, or either of them, or to pay any judgment or judgments that may be

rendered in said actions against said George White; that said Home Indemnity Company of New York further contends that if its policy is in force and effect and it is obligated thereunder to the defendant George White, that its policy and the policy issued by this plaintiff, as aforesaid, constitute concurrent insurance, and that it and this plaintiff are equally obligated to pay the expense of the defense of said actions against said George White, and are each obligated to pay that portion of any judgments rendered in said actions No. 134918 and No. 134630 against said George White which the amount of the policy issued by them, respectively, bears to the total amount of the effective insurance under said policies. [9]

That plaintiff is informed and believes, and upon such information and belief alleges, that the defendant, George White, contends that he has fully complied with all of the terms and conditions of said policy of insurance issued by defendant, Home Indemnity Company of New York, as aforesaid, and has not breached any of the terms or conditions thereof, and that said policy constitutes primary insurance against the claims of the plaintiffs in said actions No. 134918 and No. 134630, and that the defendant, Home Indemnity Company of New York, is obligated to defend said actions on his behalf and pay any judgments rendered against him therein up to but not exceeding the limits of liability set forth in said policy; but further contends that if he did breach said policy, said breach was unsubstantial and did not in anywise prejudice the defendant, Home Indemnity Company of New York, and further contends that if he did breach said policy and that by reason of said breach Home Indemnity Company of New York had been so executed from its obligations to him under said policy, that then

this plaintiff is obligated to defend said actions on his behalf and to pay any judgments rendered against him in said actions No. 134918 and No. 134630, not exceeding the limits of liability of the policy issued by this plaintiff.

That this plaintiff contends that the policy issued by Home Indemnity Company of New York is in full force and effect and is primary coverage, and that said defendant, Home Indemnity Company of New York, is obligated to undertake and at its own expense pay for the investigation of the accident hereinbefore described and the defense of the said actions against George White, and pay any judgments that may be rendered against George White until its limits of liability hereinbefore described have been exhausted, and that the policy of this plaintiff constitutes excess insurance only, and that this plaintiff is not obligated to defend said actions or to pay any judgments that may be rendered therein, except so much of [10] said judgments as may be in excess of the limits of liability of the policy issued by defendant Home Indemnity Company of New York. This plaintiff further contends that if defendant, George White, did after the occurrence of the accident hereinbefore described breach the terms of the policy issued by the defendant, Home Indemnity Company of New York, as aforesaid, on his part to be performed, and did thereby release and excuse Home Indemnity Company of New York from its obligations under said policy, that then defendant, George White, is obligated to pay the expense of the defense of said actions and to pay any judgments

rendered against him therein up to, but not beyond, the amounts which, except for said breach of said policy, Home Indemnity Company of New York would have been obligated to pay, and that this plaintiff is not obligated to defend said actions or to pay any portion of said judgments, except so much thereof (not exceeding the limits of the policy issued by it) as shall be in excess of \$100,000.00 as to any one of the plaintiffs, and \$300,000.00 for all of the plaintiffs in said actions No. 134918 and No. 134630.

XVIII.

That the defendants, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, are parties interested in and directly affected by the controversies hereinbefore alleged, and that they, and each of them, are joined in this action because of their said interest in said controversies, but that this plaintiff does not know what, if any, contentions are made by said defendants, or any of them, with reference to said controversies.

XIX.

That plaintiff has commenced this action and makes the allegations hereinbefore set forth in good faith, and believing that defendant, George White, has fully and truly stated to it all of the facts known to him relating to the accident described in the complaint on file herein, and that said George White will and is willing [11] to cooperate with plaintiff or the defendant, Home Indemnity Company of New York, whichever in the judgment of

this court is obligated to defend the defendant, George White, in said actions No. 134918 and No. 134630; and this plaintiff does not waive any defenses that it may have to any claims made against it upon its said policy if said George White has given to this plaintiff a false statement as to said accident, or if said George White refuses to perform any of the terms or conditions of this plaintiff's policy on his part to be performed.

XX.

That the plaintiff has no plain, speedy or adequate remedy at law in the premises.

Wherefore, plaintiff prays judgment and for an order and decree herein to the end that the plaintiff may obtain relief in the premises and declaratory judgment and relief from this Honorable Court, as follows:

1. For a declaration by this court of the respective rights and duties and liabilities of the plaintiff and defendant, Home Indemnity Company of New York, under the respective policies of insurance issued by them and which are in this complaint described.
2. That it be declared by this court that the plaintiff herein is not obligated to defend the actions brought in the Superior Court of the County of San Diego and in this complaint described, and has no liability to pay any judgment that may be rendered therein until said defendant, Home Indemnity Company of New York, has fully paid and discharged its liability under its said policy.

3. That it be decreed by this court that it is the duty of Home Indemnity Company of New York to defend said actions No. 134918 and No. 134630, and to pay any final judgments rendered therein against the defendant, George White, up to but not beyond the limits set forth in the policy of insurance issued by it. [12]

4. That it be decreed by this court that the only liability of plaintiff herein in connection with said actions No. 134918 and No. 134630, is the liability to pay that amount of any final judgments rendered therein in excess of the limits of liability of the defendant, Home Indemnity Company of New York, as provided in the policy of insurance issued by it, not exceeding, however, the limits of liability provided for in plaintiff's said policy of insurance.

5. That if this court find and so decree that the defendant, George White, has breached the conditions of the policy of insurance issued by Home Indemnity Company of New York, which is described in the complaint on file herein, and that thereby Home Indemnity Company of New York has been released from its obligations to the defendant George White thereunder, that then this court adjudge and declare that this plaintiff is not obligated to defend said action No. 134918 or said action No. 134630, but that its sole obligation under said policy is to pay such portion of any judgment or judgments which may be rendered against said George White in said actions as shall be in excess of the insurance that would have been available to said George White had he

not breached the terms and conditions of said policy of insurance issued by defendant, Home Indemnity Company of New York, as in this complaint alleged, and which excess is not in excess of the limits of liability as set forth in the policy of insurance issued by this plaintiff.

6. That a writ of subpoena issue out of this Honorable Court directed to each and all of the defendants herein, commanding them, and each of them, to appear on a day certain, to be fixed by this court, and that the defendants, and each of them, be required to answer each and every allegation of this suit in equity and to set forth in full their respective contentions in respect to the controversy herein alleged. [13]

7. That upon the failure of any of said defendants to so answer herein, default shall be entered against said defendants who shall so fail to answer, and that decree and judgment be entered in such case according to the prayer of this complaint.

8. Plaintiff prays for such other and further relief as to this Honorable Court shall seem just and equitable, and for all costs of suit herein.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff

Rule #4 waived. O. K. for filing.

ALBERT L. SAMES

Judge U. S. Dist. Co. [14]

Home Indemnity vs. Standard Accident

[Dorsed]: Filed Sep. 4, 1936 [18]

Acceleration

Cancellation By mailing to the company written notice stating who thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the company or by the company shall be equivalent to mailing.

If the amount insured and/or premiums shall be computed in accordance with the customary short rate table and procedure, effected and if not then earlier shall be mailed as aforesaid after cancellation notices delivered, a company a check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any premium due to the named insured.

Declarations By acceptance of this policy the named insured agrees that the declarations are his agreements and representations that this policy embodies all agreements existing between himself and the company or any of its agents relating to his business.

those whereof
P^ANY has by a duly authorized general agent,
and on the declarations
made by us, made to us, and our agents,

F. Brown
Secretary

Declaration ■ That the statements in the declarations are his agreements and representations, that his underwriting is based upon the information given in the application and that he has read and understood the policy.

the STANDARD ACCIDENT INSURANCE COMPANY
of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

PANY has caused this policy to be signed by its president and secretary at Detroit, Michigan, and countersigned on the declarations page by a duly authorized agent of the company.

Charles Brown,
Secretary
President

MEXICAN COVERAGE ENDORSEMENT

In consideration of the premium for the policy to which this endorsement is attached and of which it forms a part, it is hereby understood and agreed, that such insurance as is afforded by the policy to which this endorsement is attached while the automobile is being used for travel into the Republic of Mexico, PROVIDED THAT, this endorsement does not apply unless the insured's place of residence is within the United States of America and the automobile insured by the policy is principally garaged, maintained and used within the United States of America.

This endorsement forms a part of the Automobile Bodily Injury Liability Policy to which it is attached.

Stand

Standard Accident Insurance Company

J. Brown
Secretary

11

Standard *dent Insurance Company*
DETROIT, MICHIGAN
A STOCK COMPANY
AUTOMOBILE
BODILY INJURY
LIABILITY POLICY

READ YOUR POLICY

READ YOUR POLICY

10. J 427867

ELKHORN RICHMOND
SALINAS REGIONAL MANAGER

of life

[Title of District Court and Cause]

ANSWER OF DEFENDANT HOME INDEMNITY COMPANY OF NEW YORK, A CORPORATION

Comes now defendant Home Indemnity Company of New York, a corporation, and answering for itself alone and not for its co-defendants the plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

That this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs numbered I, II, IV, VI, XIX and XX, and on that ground denies the same. [19]

II.

Admits the averments in paragraphs numbered III, V, VII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVIII.

III.

Admits the averments in paragraph numbered VIII, except that said policy of insurance was issued by this defendant in the State of California instead of the State of Nevada as therein averred.

IV.

Denies generally and specifically, each and every, all and singular, the averments in Paragraph XVII, except that this defendant admits that it contends that defendant George White, in reporting the accident in said com-

4. For costs of suit herein expended and for such other and further relief as to this Honorable Court shall seem just and equitable.

THOMAS P. MENZIES and
HAROLD L. WATT

By Harold L. Watt

Attorneys for Defendant Home Indemnity Company of New York, a Corporation. [22]

Home Indemnity vs. Standard Accident

26

(Each a Stock Insurance Company herein called the Company)

Severally agree with the insured, named in the declarations, in consideration of the premium and in reliance upon the statement in the declarations to the limits of liability, exclusions and other terms of this policy, provided that THE HOME INDEMNITY COMPANY, NEW YORK, shall be the insurer with respect to Coverages A, B, C and no other, and THE HOME INSURANCE COMPANY, NEW YORK shall be the insurer with respect to Coverages D, E, E1, F, G, H and I and no other.

INSURING AGREEMENTS

I Coverage A—BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, but excluding bodily injury, including death, of any time resulting therefrom, sustained by any person or persons caused by accident and arising from the ownership, maintenance or use of the automobile for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

II Coverage C—MEDICAL PAYMENTS

To pay to each earner of wages, no sustainer bodily injury, caused by accident and arising out of the use of the automobile classified as an insured owned or used upon entering or alighting from the automobile while the automobile is used by or with the permission of the insured or of the responsible employee of a necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident.

III Coverage D—COMPREHENSIVE LOSS OF OR DAMAGE TO THE AUTOMOBILE EXCEPT BY COLLISION

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of the automobile, except loss caused by collision of the automobile with another object or by contact lost of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with an insured owned or used by the insured or by collision of the automobile with which it is fitted, to which it is fastened, or by loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorms, hail, water, flood, vandalism, riot or civil commotion shall not be imprecise at the time of occurrence.

IV Coverage E—COLLISION OR UPSET

To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by collision of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable here.

V Coverage E1—CONVERTIBLE COLLISION OR UPSET

To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile. Upon the occurrence of the first loss for which payment is sought hereunder, the insured shall be entitled to payment stated in the declarations. Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.

VI Coverage F—LIGHTNING AND TRANSPORTATION

To pay for loss of or damage to the automobile, hereinafter called loss, caused by lightning, hail, external discharge, standing, sinking, burning, collision or detachment of any conveyance or in upon which the automobile is being transported on land or on water.

VII Coverage G—THEFT (BROAD FORM)

To pay for loss of or damage caused by fire, lightning or transportation, as defined in this policy, to robes, wearing apparel and other personal effects which are the property of the insured or of any other person in the insured's household, while carried in or upon the automobile.

VIII Defense, Settlement, Supplementary Payments

As respects such insurance as is afforded by the other terms of this policy under coverages A and B the company shall defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company.

2. To pay all premiums on bonds to release attachments for amounts not in excess of the applicable limit of liability of this policy, oil or gas bills on appeal bonds required in any such referred suit, but without any obligation to apply or furnish such bonds, all costs to defend and prosecute the same, including attorney's fees, incurred after the entry of judgment against the named insured, if the same does not exceed the limit of the company's liability thereon and expended by the named insured in the event of judgment, for such named or medical, and surgical benefit to others as shall be imperative at the time of occurrence.

(b) To the company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request by the company agrees to pay the amounts insured under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

III. DEFINITION OF "INSURED"

The unqualified word "insured," wherever used in coverages A and B and in other parts of this policy, when applicable to the automobile, includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile or any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured. The insurance with respect to any person or organization other than the named insured does not apply.

(b) with respect to the automobile while used by any trailer not covered by like insurance in the company, or with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company, (c) to any person or organization, or to any agent or employee thereof, operating on automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof,

(d) to any employee with respect to injury to or death of another employee in the course of such employment in an accident arising out of the manner or use of the automobile in the business of such employer.

IV. AUTOMOBILE DEFINED, TRAILERS, TWO OR MORE AUTOMOBILES

Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semitrailer described in this policy. The word "trailer" shall include semitrailer.

Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile or semitrailer, to a trailer not described in this policy while used with such automobile, if such trailer is designed for use with a private passenger automobile and is not home, cabin, office, store, produce or process display, demonstration or passenger trailer. While not used with such automobile, such insurance applies also to such trailer but only with respect to the named insured and does not apply to the use of the trailer in his business occupation or with an automobile or truck type owned or used by him. The word "automobile" shall also include vehicles and other equipment permanently attached thereto.

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but a motor vehicle and a trailer or trailers attached thereto shall be liable to the one automobile or trailers units of liability, regardless of A and B and separate automobile as respects limits of liability, including any debts, obligations or expenses arising out of the operation of an automobile, public work.

V. USE OF OTHER PRIVATE PASSENGER AUTOMOBILES

Such insurance as is afforded by this policy for bodily injury liability to the named insured, if an individual and the owner of such automobile or if husband and wife either of both of whom are insured, and with respect to the spouse of such individual, if a resident of the same household and to the insured or spouse by or by a private passenger automobile or domestic servant thereof or with respect to the operator of such person in such other automobile. This insuring agreement does not apply, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or member of his household other than such chauffeur or servant.

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or of a frequent use of hired automobiles;

(b) to any insured other than as defined in this insuring agreement;

(c) to injury to or death of any person who is a named insured;

(d) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public work.

VI. TEMPORARY USE OF SUBSTITUTE AUTOMOBILE

While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, service, loss or destruction, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

VII. LOSS OF USE—THEFT—RENTAL REIMBURSEMENT

The company, following a theft covered under this policy, shall reimburse the named insured for expense not exceeding \$5 for any one substitute automobile, not in excess of the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a

AMENDMENT OF AUTOMOBILE LIABILITY POLICY

It is agreed that the policy is amended as follows

I. The following insuring agreement is added

Bail Bond Expense

The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of surety companies for such bond nor \$100.

2. Insuring Agreement V—Use of Other Private Passenger Automobiles is amended to read as follows:

V Use of Other Automobiles

Such insurance as is afforded by this policy for bodily injury liability, and for property damage liability with respect to the automobile and the owner of such automobile, as "pleasure and business," applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, the employee of such named insured or spouse, the parent or guardian of such named insured or spouse, if a minor, and a partnership in which such named insured or spouse is a partner, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse. This insuring agreement does not apply:

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(b) with respect to such employer, parent, guardian or partnership, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;

(c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or such chauffeur or servant unless the named insured or spouse is present in such automobile;

(d) to any insured other than as defined in this insuring agreement;

(e) to injury to or death of any person who is a named insured;

(f) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

3. Coverage C—Medical Payments is amended to read as follows:

Coverage C—Medical Payments

To pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the automobile, if the injury arises out of the use thereof which is insured for bodily injury liability and is by or with the permission of the named insured, or (2) any other automobile with respect to the use of which insurance is afforded under Insuring Agreement V of this policy, if the injury arises out of the use thereof and results from (a) the operation of said automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (b) the occupancy of said automobile by the named insured or spouse, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident. The insurance afforded with respect to such other automobiles shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

4. The word "automobile" as used in Coverage C—Medical Payments, includes such trailers as are insured for bodily injury liability under the second paragraph of Insuring Agreement "Automobile" Defined, Trailers, Two or More Automobiles, and no other trailers.

5. In exclusion (d), the words "or while engaged in the operation, maintenance or repair of the automobile" are deleted in connection with Coverage C—Medical Payments.

This endorsement forms a part of Policy No. GAU 6011452 issued to WALTER HAGGETY et al by THE HOME INDEMNITY COMPANY

and is effective from DECEMBER 2ND, 1945

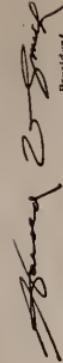
(12 of 1 M Standard Time)

Counter-signed at NOLICH HOLLOWOOD, C.L.

By CHIEF DE YOUNG

Form H-100-A-258 & 46*

Printed in U.S.A.


President

[Title of District Court and Cause]

ANSWER OF DEFENDANT GEORGE WHITE

Comes now defendant, George White, and answering the complaint on file herein admits, denies and alleges as follows:

I.

Admits each and all of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX and XX of the complaint on file herein, except that this defendant is informed and believes and, upon such information and belief, alleges the fact to be that the true name of the corporation referred to in Paragraphs V, VIII, IX, XIII, XV and XVI of the complaint on file herein as "North Lumberland Mining Company" is in fact "Northumberland Mining Co."

II.

Further answering the complaint on file herein, this defendant alleges that within twenty days after the occurrence of the [31] accident described in the complaint on file herein, this defendant reported to defendant, Home Indemnity Company of New York, all of the facts within his knowledge as to the occurrence of the accident described in the complaint on file herein, and the witnesses to said accident, and that said report contained particulars sufficient to identify this answering defendant as an insured under the policy issued by said Home Indemnity Company of New York and to identify Northumberland Mining Co. as the named assured in said policy, and gave to said Home Indemnity Company of New York all of the information respecting the time, place and circumstances of said accident and the names and addresses

of the injured and of available witnesses, which were known to or were reasonably obtainable by this answering defendant, and that this defendant has at all times co-operated with the defendant, Home Indemnity Company of New York, in the defense of actions numbered 134918 and 134630 in the Superior Court of the State of California in and for the County of San Diego, which are more particularly described in the complaint on file herein, and is ready, able and willing to cooperate with said defendant, Home Indemnity Company of New York, in the defense of said actions, and will attend hearings and trials and assist in effecting settlements and securing and giving evidence, and obtaining attendance of witnesses, and in the conduct of the defense of said actions.

III.

That this defendant has verified and delivered to defendant, Home Indemnity Company of New York, answers to the complaints filed in said actions numbered 134918 and 134630, true and correct copies of which are annexed hereto and marked respectively Exhibits A and B; that said answers were filed in said actions in behalf of this answering defendant by the attorneys employed by defendant, Home Indemnity Company of New York. [32]

IV.

This defendant further alleges that defendant, Home Indemnity Company of New York, with full knowledge of all of the facts concerning the happening of said accident and of the errors, if any, in the report of said accident made by this answering defendant, undertook the investigation of said accident and the defense of said actions numbered 134918 and 134630 in the Superior Court of the State of California in and for the County

of San Diego, and that said defendant has thereby waived the breach, if any there was, by this defendant of the conditions of the policy of insurance issued by said Home Indemnity Company of New York.

Wherefore, this defendant prays:

1. For a declaration by this court of the respective rights of the parties;
2. That it be decreed by this court that it is the duty of the Home Indemnity Company of New York to defend on behalf of this answering defendant said actions numbered 134918 and 134630 at its own expense, and to pay any final judgments rendered therein against this defendant up to but not beyond the limits of indemnity set forth in the policy of insurance issued by it, and that the Standard Accident Insurance Company of Detroit is obligated to pay any part of said final judgments in excess of the amounts which the defendant, Home Indemnity Company of New York, is obligated to pay, not exceeding the limits of the policy issued by it;
3. That if this court should find that the defendant Home Indemnity Company of New York is not obligated to defend said actions on behalf of this defendant and is not obligated to pay any judgments rendered therein, that then this court declare that the plaintiff, Standard Accident Insurance Company of Detroit, is obligated to defend said actions and to pay any judgments rendered [33] against this defendant therein up to but not beyond the limits of indemnity set forth in its policy.

LUCE, FORWARD, LEE & KUNZEL
By Edgar A. Luce

[Verified] [34]

"EXHIBIT A"

In the Superior Court of the State of California
in and for the County of San Diego

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by
Mildred E. Taylor, their Guardian ad Litem, Plaintiffs,
vs. George White, et al., Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering the complaint on file herein for himself and not on behalf of his codefendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs II, V and VI of the complaint on file herein and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs, except that this defendant admits that Claude McLester Lee was at the time of his death an adult over the age of twenty-one (21) years.

II.

Answering paragraph III of the complaint on file herein this defendant alleges that the automobile mentioned in said paragraph was at the time of said accident owned by the [35] Northlumberland Mining Company, a corporation, and at the time and place of the accident described in the complaint this defendant was driving said automobile by and with the consent of said corporation.

III.

This defendant denies generally and specifically each and all of the allegations in paragraph IV of the complaint on file herein, except this defendant admits that the automobile described in said paragraph, and while being driven by this defendant, did at or about the time and place described in said paragraph collide with Claude McLester Lee and that as a result of said collision said Claude McLester Lee sustained injuries which directly and proximately resulted in his death.

IV.

This defendant denies that the plaintiffs, or either of them, have been damaged in any sum whatsoever.

And for a Further, Separate and Second Defense, This Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, this defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant George White [36]

State of California,
County of San Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

GAYLE H. DAVIS

Notary Public in and for Said County and State [37]

“EXHIBIT B”

In the Superior Court of the State of California
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his Guardian ad Litem, James Richard Osborne, and James Richard Osborne, Plaintiffs, vs. George White, and North Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant, George White, and answering the complaint on file herein for himself and not on

behalf of his codefendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs I, IV and V of the first alleged cause of action and paragraph II of the second alleged cause of action of the complaint on file herein, and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs and the whole thereof.

II.

Denies that the plaintiff, James Carl Fitzgerald has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), or in [38] any sum, or at all; denies that the plaintiff James Richard Osborne has been damaged in the sum of Five Hundred Dollars (\$500.00), or in any other sum, or at all.

III.

Answering paragraph II of the first alleged cause of action set forth in the complaint on file herein, this defendant denies generally and specifically each and all of the allegations of said paragraph, except this defendant admits that the Lincoln Zephyr automobile described in said paragraph was at the time of the accident described in the complaint, owned by the defendant, North Lumberland Mining Company, and this defendant was at the time and place of the accident driving said automobile with the full knowledge and consent of said North Lumberland Mining Company.

IV.

Answering paragraph III of the first alleged cause of action of the complaint on file herein this defendant denies generally and specifically each and all of the allegations of said paragraph, except that this defendant admits that the automobile driven by him did at or about the time and place described in the complaint, collide with Leana Mae Osborne Lee and that as a result of said collision Leana Mae Osborne Lee died, and except that this defendant has not information and belief sufficient to enable him to answer the allegations of said paragraph that said Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald, and for want of such information and belief and basing his denial on that ground denies that Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald.

And for a Further and Separate Defense to Each of the First and Second Causes of Action Set Forth in the Complaint on File Herein This Defendant Alleges: [39]

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and
HAROLD L. WATT

By Thomas P. Menzies
Attorney for Defendant George White

State of California,
County of San Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

GAYLE H. DAVIS

Notary Public in and for Said County and State [40]

[Affidavit of Service by Mail]

[Endorsed]: Filed October 9, 1946. [41]

[Title of District Court and Cause]

ANSWER

James Carl Fitzgerald, a minor, by and through his guardian ad litem, James Richard Osborne, and James Richard Osborne, severing themselves from the other defendants herein, for themselves only, deny certain of the allegations of plaintiff's complaint as follows:

I.

These answering defendants have not sufficient information or belief to enable them to otherwise answer to the allegations of paragraphs XVI and XVII of plaintiff's complaint, and basing their denial upon said ground, deny generally and specifically [42] each and every allegation of said paragraphs of plaintiff's complaint.

Wherefore, these answering defendants pray that plaintiff be put upon strict proof of the allegations hereinabove denied, and *they* they have such other and further relief as to the court seems just in the premises.

EDGAR B. HERVEY

Attorney for Defendants

[Verified]

Received copy of within Answer this 17 day of October, 1946. Nourse & Jones, Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1946. [43]

[Title of District Court and Cause]

ANSWER OF DEFENDANTS,
MICHAEL LEE AND PATRICIA LEE

Come now Michael Lee and Patricia Lee, minors, each by Mildred E. Taylor, their guardian ad litem herein, and, answering the complaint herein, admit, deny and allege as follows:

I.

Allege that Michael Lee is a minor of the age of nine years and that Patricia Lee is a minor of the age of eleven years; that by an order of the above-entitled court duly made herein on September 10, 1946, Mildred E. Taylor was duly appointed guardian ad litem of the said minors in this cause; that said order has not been revoked and is in full force and effect and that by virtue thereof Mildred E. Taylor is now the duly appointed, qualified and acting guardian ad litem of said minors. [44]

II.

Admit the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVI, XVIII and XX.

III.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs XVII and XIX, and, basing their denial upon that ground, deny generally and specifically each and every allegation thereof.

IV.

Answering paragraph XII, deny that by the terms of the policy mentioned in said paragraph XII, it was fur-

ther provided that such insurance as to the use of said substituted automobile should be excess insurance over any other valid and collectible insurance available to George White under a policy applicable with respect to the substituted automobile, or otherwise, against loss covered by either or both of said insuring agreements;

Further answering paragraph XII, allege that defendant, Home Indemnity Company of New York, a corporation, asserts to and has informed these answering defendants that the insurance otherwise afforded George White as the driver of the Lincoln automobile mentioned in the complaint is not and cannot be made collectible or available to George White against loss arising out of the accident mentioned in the complaint;

Further answering paragraph XII of the complaint, these defendants are informed and believe, and, upon such information and belief, allege the fact to be that defendant, Home Indemnity Company of New York, at all times since the accident mentioned in the complaint, has had full and adequate notice of the occurrence of the accident, has fully and thoroughly investigated the accident and has had and received the best possible assistance and cooperation of and from George White and the owner of said Lincoln automobile, [45] and in no way had or has been prejudiced by failure by George White or the owner of said Lincoln automobile to comply at an earlier time or in a different or more formal manner with the conditions and terms of the last-mentioned policy;

Deny each and every other allegation contained in paragraph XII.

For a Second, Separate and Distinct Defense to the Cause of Action Set Forth in Said Complaint, These Answering Defendants Allege:

I.

That these answering defendants are informed and believe, and, upon such information and belief, allege that immediately following the accident described in the complaint on file herein George White reported to Home Indemnity Company of New York all the facts within his knowledge as to the accident described in said complaint, giving the names of the witnesses known to him and such other particulars and facts as would and did enable and permit said Home Indemnity Company of New York to identify the said George White, the policy of insurance mentioned in the complaint as issued by Home Indemnity Company of New York, Northumberland Mining Company as the assured named in the policy, and such other information as was known to him respecting the time, place and circumstances of the accident, the names and addresses of the injured or dead; and that the said George White has at all times cooperated with Home Indemnity Company of New York in the investigation of the accident and in the defense of the actions filed in the Superior Court of San Diego County, described in the complaint herein;

That these answering defendants are informed and believe, and, upon such information and belief, allege that the defendant, George White, is now, and at all times

since said accident has [46] been, and will at all times hereafter be, ready, willing and able to cooperate with Home Indemnity Company of New York in the defense of said actions;

That these answering defendants are informed and believe, and, upon such information and belief, allege that Home Indemnity Company of New York has known about the accident mentioned in the complaint at all times from and after approximately twenty-four hours after the occurrence thereof, has fully and thoroughly investigated the accident, and within three days after the accident knew the names and addresses of all available witnesses, and had an opportunity at a public hearing authorized by law, to wit, a coroner's inquest in the County of San Diego, State of California, to examine all witnesses under oath and to require defendant, George White, to be sworn as a witness and examined into the facts of the accident; that Home Indemnity Company of New York was represented at such inquest by its duly authorized attorney at law; that Home Indemnity Company of New York; through its duly authorized attorneys, has prepared pleadings, and has signed and filed pleadings in the civil actions in the Superior Court of San Diego County, mentioned in the complaint; that the said Home Indemnity Company of New York, through its duly authorized attorneys at law, within seven days after said accident, did attempt to negotiate a settlement with these answering defendants, such settlement being settlements of the liability of George White and North-

umberland Mining Company, and each thereof, for the death of Claude McLester Lee, and the cause of action then held by these answering defendants under the laws of the State of California, arising out of such death, and the relationship of these answering defendants to Claude McLester Lee, and the damages suffered by them as a result of such death.

II.

That the defendant, Home Indemnity Company of New York, [47] with full knowledge of all the true facts concerning the said accident, did enter into such negotiations for settlement, did enter into and accept the defense of said actions, and each thereof, and did, in all ways, accept and undertake to perform the obligations, duties and liabilities on its part to be performed under its said policy of insurance, mentioned in the complaint; and that the said Home Indemnity Company of New York has waived the breach, if any there was, by defendant, George White, of the conditions of the said policy of insurance issued by Home Indemnity Company of New York.

Wherefore, these answering defendants pray:

- (1) For a declaration of the respective rights of the parties;
- (2) That it be decreed by the Court that it is the duty of Home Indemnity Company of New York to comply with the agreements on its part to be performed under the terms and provisions of its said policy of insurance;

(3) That in the event the Court finds that Home Indemnity Company of New York is not obligated to defend said actions or to otherwise comply with the agreements on its part to be performed under the said policy, that then this Court declare that Standard Accident Insurance Company of Detroit is fully obligated under the agreements of its policy of insurance, mentioned in the complaint, to pay, on behalf of George White and Northumberland Mining Company, and each thereof, all sums which they, or either of them, shall become obligated to pay by reason of the liability imposed upon them, or either of them, by law for damages for the death of Claude McLester Lee, caused in and by reason of the accident mentioned in the complaint; and

(4) For such other and further relief as to the Court may seem proper in the premises.

WILLIAM GUTHRIE

JOHN B. LONERGAN and

DONALD W. JORDAN

Attorneys for Defendants, Michael Lee and
Patricia Lee

By John B. Lonergan [48]

[Verified]

[Affidavit of Service by Mail on Nourse & Jones]

[Endorsed]: Filed Oct. 28, 1946. [49]

[Title of District Court and Cause]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT, HOME INDEMNITY COMPANY OF NEW YORK

Under and in accordance with Rule 33 of the Federal Rules of Civil Procedure, plaintiff hereby propounds and requires that defendant, Home Indemnity Company of New York, answer the following interrogatories:

1. Did the Northumberland Mining Co. report to you the accident which is described in paragraph XIII of the complaint herein, which accident occurred on or about the 20th day of July, 1946, at or near Solano Beach, California. [Written in margin]: Allowed.

2. If your answer to Interrogatory No. 1 is that a report was made to you by Northumberland Mining Co., state whether or not said report was in writing. [Written in margin]: Allowed. [50]

3. If your answer to Interrogatory No. 2 is that this report was in writing, attach a full, true and complete copy of said report. [Written in margin]: Allowed.

4. If your answer to Interrogatory No. 2 is that the report of Northumberland Mining Co. was oral, state the substance of said report. [Written in margin]: Allowed.

5. Did the defendant, George White, report to you the accident described in paragraph XIII of the complaint on file herein [Written in margin]: Allowed.

6. If your answer to Interrogatory No. 5 is in the affirmative, state whether or not said report was in writing. [Written in margin]: Allowed.

7. If your answer to Interrogatory No. 6 is that said report was in writing, attach a full, true and correct copy of said report. [Written in margin]: Allowed.

8. If your answer to Interrogatory No. 6 is that said report was not in writing, state whether or not the report was made before and recorded by a shorthand reporter. [Written in margin]: Allowed.

9. If your answer to Interrogatory No. 8 is that said oral report was recorded by a shorthand reporter, state the name of the reporter and whether or not you have a transcript of such report. [Written in margin]: Allowed.

10. If your answer is that you have a transcript of said report, attach a full, true and complete copy of such transcript. [Written in margin]: Allowed.

11. If your answer to Interrogatory No. 6 is that George White's report was oral, state the names and addresses of the persons present at the time said report was made. [Written in margin]: Allowed. [51]

12. If your answer to Interrogatory No. 8 is that said report was not recorded in shorthand, state the substance of his oral report. [Written in margin]: Allowed.

13. If your answer to Interrogatory No. 5 is that George White did report to you said accident, state whether or not, after the date of his original report, he made any further report to you of any facts concerning said accident or his knowledge thereof. [Written in margin]: Allowed.

14. If your answer to Interrogatory No. 13 is that he did make a further report, attach a copy thereof hereto if said additional report was in writing, or if it was

oral state the substance of said additional report, and give the date of making of said additional report, and the names and addresses of the persons present. [Written in margin]: Allowed.

15. Did John T. Holt, attorney at law for George White, state to you in behalf of George White any facts concerning the accident described in paragraph XIII of the complaint on file herein, in addition to those set forth in the written statement of George White? [Written in margin]: Not allowed.

16. If your answer to Interrogatory No. 15 is in the affirmative, state the substance of the statements made to you by John T. Holt, and state the name and address of the person to whom said statements were made. [Written in margin]: Not allowed.

17. In paragraph I of the Separate and Special Defense set forth in your answer to the complaint on file herein, you allege that the defendant, George White, intentionally gave to you false, misleading and conflicting statements. State in detail what statements were made to you by George White you claim to be false, misleading or [52] conflicting. [Written in margin]: Allowed.

18. State the names and addresses of the persons to whom each of said false, misleading or conflicting statements was made. [Written in margin]: Not allowed.

19. As to each statement made by George White which you assert was false or misleading, state the names of the witnesses by whom you intend to prove that said statements were false or misleading, and state the facts which you expect to prove by said witnesses. [Written in margin]: Not allowed.

20. State the date upon which you discovered or were advised as to the facts which you contend show that the statements of George White were false or misleading. [Written in margin]: Allowed.

21. Did you, through your agents, attorneys or representatives, investigate the accident referred to in Interrogatory No. 1? [Written in margin]: Allowed.

22. If your answer to Interrogatory No. 21 is in the affirmative, state the name and address of the person or persons conducting said investigation. [Written in margin]: Not allowed.

23. If your answer to Interrogatory No. 21 is in the affirmative, state whether or not said persons made a written report or reports to you of said investigation. [Written in margin]: Allowed.

24. If your answer to Interrogatory No. 23 is that a written report or reports were made, state the name and address of the person who now has custody of such reports. [Written in margin]: Allowed. [53]

25. State the name and address of the person now having custody of the reports of said accident or of any transcript of reports of said accident, which reports were made by Northumberland Mining Co. or George White. [Written in margin]: Allowed.

26. Did you file, or cause to be filed, on behalf of defendant, George White, answers on his behalf in those certain actions pending in the Superior Court of the State of California in and for the County of San Diego, entitled respectively, "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their guardian ad litem, Plaintiffs v. George White, et al., Defendants," numbered 134918 in the files of said court, and "James

Carl Fitzgerald, a minor, by and through his guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs vs. George White and North Lumberland Mining Company, Defendants," numbered 134630 in the files of said court, which said actions are described in paragraph XIV and XV of the complaint on file herein? [Written in margin]: Allowed.

27. If your answer to Interrogatory No. 26 is in the affirmative, state whether or not you filed, or caused the said answers to be filed, after you had discovered that defendant, George White, had made to you false, misleading or conflicting statements as to the facts of said cases. [Written in margin]: Allowed.

28. In your answer you admit that you have denied all liability and obligation to defendant, George White, under the policy of insurance which is annexed to your answer. State whether or not, prior to the commencement of this action, you advised the defendant, George White, of your denial of liability to him. [Written in margin]: Not allowed. [54]

29. If your answer to Interrogatory No. 28 is in the affirmative, attach a copy of any letter written by you, or in your behalf, to said George White advising him that you did deny liability. [Written in margin]: Not allowed.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [55]

[Affidavit of Service by Mail]

[Endorsed]: Filed Oct. 25, 1946. [56]

[Title of District Court and Cause]

ANSWERS OF DEFENDANT HOME INDEMNITY COMPANY OF NEW YORK, A CORPORATION, TO INTERROGATORIES PROPOUNDED BY PLAINTIFF.

Under and in accordance with Rule 33 of the Federal Rules of Civil Procedure, defendant Home Indemnity Company of New York, a corporation, hereby answers the interrogatories propounded by plaintiff.

1. In answer to the first interrogatory it saith: A broker through whom the insurance was placed telephoned that the newspapers reported that George White was involved in an automobile accident, but that this defendant was not involved because White carried his own insurance.

2. In answer to the second interrogatory it saith: Said report was not in writing. [57]

3. In answer to the third interrogatory it saith: Said report was not in writing.

4. In answer to the fourth interrogatory it saith: Mr. Walter Haggerty, President of the Northumberland Mining Company, on July 22, 1946, made an oral statement which was transcribed by a court reporter, a copy of which is hereto attached.

5. In answer to the fifth interrogatory it saith: Yes.

6. In answer to the sixth interrogatory it saith: Said report was not in writing.

7. In answer to the seventh interrogatory it saith: Said report was not in writing.

8. In answer to the eighth interrogatory it saith: Yes.

9. In answer to the ninth interrogatory it saith: R. B. Whitcomb, Official Shorthand Reporter, San Diego, California, and this defendant has a transcript of such report.

10. In answer to the tenth interrogatory it saith: A full, true and complete copy of such transcript is hereto attached.

Case No. 5729 O'C, Civ. Std. Accid. vs. Home Ind. Plf. Exhibit Date 1/20/47. No. 6 in Evidence. Ans. 5, 8, 9, 10. Clerk, U. S. District Court. Sou. Dist. of Calif. Cross, Deputy Clerk.

11. To the eleventh interrogatory it saith: Thomas P. Menzies, 548 South Spring Street, Los Angeles, L. E. Clifton, 639 South Spring Street, Los Angeles, [58] and R. B. Whitcomb, Court House, San Diego.

12. To the twelfth interrogatory it saith: Said report was recorded in shorthand.

13. In answer to the thirteenth interrogatory it saith: He did not report any additional facts or his knowledge of the accident other than that he said "he must have gone to sleep" and that "he might have hit the victims while asleep without knowing it."

14. In answer to the fourteenth interrogatory it saith: See answer to Interrogatory No. 13.

Case No. 5729 O'C. Std. vs. Accident. Plf. Exhibit. Date 1/20/47. No. 7 in Evidence. Ans. 13 & 14. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

17. In answer to the seventeenth interrogatory it saith:

- (1) That the damage to the left front fender of the car of the Northumberland Mining Co., which he was driving, occurred at the Hollywood Park Race Track and not at the scene of the accident.
- (2) That when he came out of the Race Track the left headlight was broken, smashed in; that the damage was done while the car was parked at said Race Track, and that someone must have taken the car without his knowledge or consent.
- (3) That between the time he left a drive-in stand in the City of San Clemente and the time that he arrived in the City of San Diego, he did not hit any pedestrian or other object on the road.
- (4) That between the time he left San Clemente and the time that he left the Del Mar Hotel in Del Mar, California, he was not involved in any traffic accident. [59]
- (5) That he did not remember passing through Solano Beach and that he did not collide with any object.
- (6) That the automobile operated by him did not collide with any object or individual person.
- (7) That he did not know that he had hit anyone.
- (8) That "if anybody got killed, it was an accident I knew nothing about."
- (9) "I have told you about all I know about it."

20. In answer to the twentieth interrogatory it saith: On, to-wit, August 19, 1946.

21. In answer to the twenty-first interrogatory it saith: Yes; under a reservation of rights.

23. In answer to the twenty-third interrogatory it saith: Yes.

24. In answer to the twenty-fourth interrogatory it saith: L. E. Clifton, Claims Manager, The Home Indemnity Company, 639 South Spring Street, Los Angeles, California.

25. In answer to the twenty-fifth interrogatory it saith: Some of the records and reports are in the custody of E. M. Jewell, Claims Manager for The Home Indemnity Company, 59 Maiden Lane, New York, and some of the records are in the possession of Thomas P. Menzies, 548 South Spring Street, Los Angeles, California, attorney of record for said defendant in this action.

26. In answer to the twenty-sixth interrogatory it saith: Yes. [60]

27. In answer to the twenty-seventh interrogatory it saith: Yes; with reservation of rights.

THE HOME INDEMNITY COMPANY OF
NEW YORK, a Corporation,

By L. E. Clifton

Claims Manager [61]

IN RE: NORTHUMBERLAND MINING
COMPANY—GEORGE WHITE

Statement of Walter Haggerty July 22, 1946, at 3:00 P. M., Room 349 Beverly Hills Hotel, Beverly Hills, Calif.

Present: Thomas P. Menzies.

Q. (By Mr. Menzies) Mr. Haggerty, this car Mr. White was driving a Lincoln Zephyr? A. Yes.

Q. You bought the car around in 1942, didn't you?

A. Yes. One of our stockholders owned the car and we sold the car we were using for that purpose and bought this one at a very good price, since we had to have it in our business.

Q. I take it that this company is incorporated in Nevada? Is that right? A. Yes.

Q. What is the name of it?

A. Northumberland Mining Company.

Q. When did you incorporate?

A. We were incorporated about 1939.

Q. About 1939?

A. Yes. I can get you the exact date, if you want it.

Q. That is close enough. It was incorporated in the State of Nevada? A. Yes.

Q. And since that time it has been a duly organized and operating company in that state? [62]

A. Yes.

Q. Are you an officer of the company?

A. I am the president of the company.

Q. And this Lincoln Zephyr belonged to the company?

A. It belonged to the company.

Q. It was stored here regularly?

A. I have had it here since we had the order closing gold activities.

Q. You have kept it here at the Beverly Hills Hotel?

A. Yes. It has been here most of the time except when I had some business around.

Q. Was that car involved, so far as you know, in an accident recently? I am speaking now of Mr. White's difficulties.

A. Not that I know of. I would have no knowledge of it.

Q. You have no personal knowledge of it?

A. No.

Q. You have been ill, I understand, for a week or so? A. A week ago Monday.

Q. How did George White come in possession of the car?

A. He has a Packard and he is having some piston and cylinder work done on it, and he asked me if I had any objection—I have driven with him in his car many times—to him borrowing the car from me to carry on some things he had to do.

Q. When did you give him permission to use it? [63]

A. He used it for about three afternoons, say from Wednesday or Thursday on. He used it just in the afternoons, and then he had this business down the road and then he asked me if he could use it.

Q. Business at San Diego, or some place?

A. At San Diego.

Q. And you gave him permission to use the car?

A. Yes.

Q. When was it he asked you to use the car to go to San Diego? When he took the car?

A. It was about Friday or Saturday afternoon he asked me if he could use the car.

Q. After you gave him permission to take the car to San Diego, you don't know what happened except what he has told you? A. That is right.

Q. Have you talked to him?

A. I talked to him just now.

Q. Did he tell you how the accident happened? A. No. I read the paper and he said "Absolutely not so." He said, "There is some big mistake, and I can not understand it." That was his statement, which he will probably tell you. When I read the paper and then listened to him, it didn't seem to make sense.

Mr. Menzies: That is all. [64]

SWORN STATEMENT OF GEORGE WHITE
MADE ON THE 23d DAY OF JULY, 1946,
AT SAN DIEGO, CALIFORNIA

Present: Mr. Thomas P. Menzies, Attorney at Law; Mr. Clifton; R. B. Whitcomb, Notary Public and Short-hand Reporter.

Questions by Mr. Menzies:

Q. State your full name.

A. George White.

Q. How old are you, Mr. White?

A. Fifty-three.

Q. Where do you live?

A. At the Beverly Wilshire Hotel, Beverly Hills.

Q. What is your business or occupation?

A. Theatrical producer.

Q. Are you employed at the present time?

A. I employ myself.

Q. Have you an office, Mr. White?

A. No, I use the hotel as my office.

Q. You are a permanent resident of the State of California? A. Yes.

Q. You have been for several years? [65]

A. Yes.

Q. Now do you know of a Mr. Walter Haggerty?

A. Yes.

Q. He also resides at the Beverly Wilshire Hotel, Beverly Hills, California? A. Yes.

Q. Did you at any time within the last week borrow a 1942 Lincoln Zephyr that was sort of a silver gray color from him? A. Yes.

Q. And that bore a Nevada license plate, 1946 license 33-674? A. Yes, I think so.

Q. What day did you borrow that car from Mr. Haggerty?

A. I picked it up sometime after noon time Saturday.

Q. On Saturday the 19th of July? This is the 23d.

A. It was last Saturday. The date I don't know.

Q. You own a car yourself? A. Yes.

Q. What kind of a car?

A. A Packard Coupe 1942.

Q. Was your car at that time in the garage being worked on?

A. It was in the Earl C. Anthony place in Beverly Hills having new rings and pistons put on.

Q. How long had the car been in there? [66]

A. It is still there.

Q. You picked up Mr. Haggerty's car around noon on the 19th of July, and that was in the Beverly Wilshire Garage, was it? A. That is right.

Q. Where did you go then?

A. To the Inglewood Race Track.

Q. Was that Friday or Saturday?

A. Saturday.

Q. That was the 20th rather than the 19th. You went directly from the Beverly Wilshire Hotel to the Inglewood Race Track at Inglewood, California?

A. Yes, that is right.

Q. What time did you get to the race track?

A. Oh, I couldn't tell exactly what time. It might have been probably around between twelve-thirty and twelve forty-five, around that time. I would say between half past twelve and twelve forty-five.

Q. Did you park the car there? A. Yes.

Q. Do you remember what area you parked it in?

A. Right around behind the club house, the Turf Club area. The club house, Turf Club area; I think that is what you call it.

Q. Did you get a parking ticket for it?

A. No. [67]

Q. Did you lock the car? A. No.

Q. After you parked the car where did you go?

A. I went to the race track.

Q. Into the Turf Club?

A. No, I went into the, what they call the grandstand.

Q. Then how long did you remain there at the Inglewood Park Race Track?

A. Until the last race was over.

Q. Do you remember what time of day that was?

A. It is usually around six o'clock or a little after, I imagine.

Q. Did you see anybody you knew there at the race track? A. Yes, lots of people.

Q. Can you remember any of their names?

A. Well; too many names to mention.

Q. What time did you go out to your car after the last race?

A. After the last race was over. Everybody makes sort of a rush.

Q. Do you remember what time that was?

A. Probably after the last race, five or ten after six, I don't know.

Q. When you went out to where you parked your car did you find it there? [68]

A. I found it about, I would say twenty or thirty yards down the line from where I had left it.

Q. How do you fix the point where you left your car?

A. Well, there is a line, white chalk lines. I left it about in the middle of—I left it about in the middle and it was down near the end of it.

Q. Do they have those parking areas marked with letters or figures? Are they numbered?

A. I never noticed that matter.

Q. Now at the time you got this Lincoln Zephyr from Mr. Haggerty was there any damage to the front end of the car? A. When I got it from—

Q. Yes. A. I didn't notice.

Q. When you parked it there around one o'clock at the race track was there any damage to the front end of the car?

A. I didn't notice if there was.

Q. You weren't involved in any traffic accident between the time you left the Beverly Wilshire Hotel and the time you arrived at the race track? A. No.

Q. After you came out of the race track after the last race did you examine the car?

A. When I came out the left headlight was broken, smashed in. I just looked around. I didn't see anything or anybody there, everybody was rushing off for their cars. [69] There was nobody there to complain to and it would just be a waste of time because it is a pretty big place. I said, "Oh, the hell with it, what will I do, or what will I tell the guy."

Q. What was the condition of the left fender?

A. I didn't notice the fender. I just saw it and jumped in the car to get out of the track as soon as I could.

Q. Do you remember what damage was done to the left headlights? Was it merely the glass was broken or was the whole headlight destroyed?

A. Bashed in, and there was some of the glass around there.

Q. Laying in the parking area?

A. In the headlight.

Q. In the headlights?

A. Yes, in the headlight.

Q. Was it merely that the headlight was broken or was it depressed into the fender?

A. It was depressed in. It looked to be. I didn't stop to make an examination of it. I said, "What is the use?"

Q. Were there any marks on that fender when you saw it such as stains, brown stains or anything like that?

A. I didn't look to see.

Q. Then after you looked—

A. As a matter of fact as I came toward the car I saw the car parked this way and I thought—let's skip what [70] I thought to myself—as I neared the car I come to the right side of the car. I saw the thing and I said, "Well, what is the use of who the hell did it; there are a million cars and people rushing in and out; there is nobody to complain to, no cops," so I got in the car, in the right side instead of walking around, you know.

Q. Was there any parking lot attendant there when you first parked the car that afternoon?

A. I didn't see any.

Q. Was there any there when you came out?

A. I didn't see any.

Q. After you got in the car after you looked at the fender, the left front fender, where did you go then?

A. I drove the car to the hotel.

Q. Which hotel?

A. The Beverly Wilshire Hotel.

Q. In other words, you drove from the Inglewood Race Track back to the Beverly Wilshire Hotel?

A. Yes.

Q. Do you remember what time you got back to the Beverly Wilshire Hotel?

A. It is about a half hour, twenty-five minutes to a half hour.

Q. You got there about—

A. I got to the hotel about twenty-five past six.

Q. How long did you remain there at the hotel? [71]

A. Just a few minutes, long enough to pick up my bag.

Q. You went up to your room to get it and turned around and came back down? A. I went up to my room to get it and came back.

Q. Then where did you go?

A. I left for San Diego.

Q. Which road did you take going to San Diego?

A. The 101 Highway.

Q. Where did you get on to 101?

A. I go along the street from the hotel to Olympic, then I go up Olympic to a street called Overland, and then I cut across Overland to another street the name of which I don't know, then I go right a few blocks and get on Sepulvedo—I don't know the names of all the streets—then Sepulvedo goes right into 101.

Q. You followed Sepulvedo on to 101?

A. Yes.

Q. Did you stop any place?

A. I stopped at a drive-in.

Q. Where? A. In San Clemente.

Q. Between the time you left the Beverly Hills Hotel you did not get out of the car and go in any place until you went in to a drive-in stand in San Clemente?

A. No.

Q. Do you know which side of San Clemente that drive-in stand was located?

A. Yes, it is just as you come into San Clemente from Beverly Hills.

Q. What time was it when you got to that drive-in stand?

A. I would say about—I go down there every Saturday night; it is about seventy miles. I usually travel around forty miles an hour, thirty-five or forty. I would say sometime around nine o'clock or eight forty-five. Sometime around nine o'clock, eight forty-five or nine o'clock.

Q. You had left the hotel about six forty-five or thereabouts?

A. Between six thirty-five and forty-five.

Q. Six thirty-five and six forty-five. I assume you went into the hotel and got your bag. A. Yes.

Q. You drove straight down there without getting out of the car. Were you involved in any traffic accident between the time you left the Beverly Wilshire about six thirty or six forty-five until you stopped at the drive-in stand somewhere between eight forty-five and nine o'clock in San Clemente? A. No.

Q. How long did you remain there at the drive-in stand?

A. Oh, I imagine about ten minutes, ten or fifteen minutes. [73]

Q. Did you have something to eat there?

A. I had a couple of cups of coffee.

Q. Was that all?

A. A couple of cups of coffee and a sandwich.

Q. Do you remember who served you there at the drive-in stand?

A. It was a girl. I didn't pay any attention to her.

Q. Was it the one who usually waited on you when you stopped there on Saturday night?

A. I wouldn't know if she was there because I don't usually stop there.

Q. I misunderstood you. I thought you said you stopped in there before coming down.

A. I had stopped there before but not as a usual thing, once in awhile. In all the months of going through I may have stopped at this place two or three times.

Q. What time did you leave the drive-in stand?

A. I should say sometime approximately between nine and nine-fifteen or nine-twenty.

Q. Did anything occur there at the drive-in stand that might in any way help this girl to identify you that waited on you?

A. The only thing that she might remember is the fact that I took the coffee outside and sat in the car and listened to the car radio. I went back with the cup and got another cup of coffee and came back again to the car. When [74] I brought it back she was standing right by the door as you go in and I put the cup and saucer up on a higher ledge that almost reached to her chin and I left what change there was.

Q. When you went back to the Beverly Hills Hotel after— A. Beverly Wilshire.

Q. Beverly Wilshire, thank you—after the grip, did you talk to Mr. Haggerty?

A. I just stopped by his door and said, "How do you feel?" He had a cold. "How do you feel" and I rushed off.

Q. Mr. Haggerty gave you permission to drive the car down to San Diego? A. Yes.

Q. You told him you were going there?

A. Yes, he knew that.

Q. Now after you left the drive-in stand in San Clemente around nine-fifteen where did you go?

A. Straight on to San Diego.

Q. Between the time you left the drive-in stand and the time you got to San Diego were you involved in any traffic accident? A. No sir.

Q. Did you hit any pedestrian or any other object on the road? A. No, not that I know of.

Q. Did you collide with any automobile?

A. No. [75]

Q. Or truck or any other object? A. No.

Q. Do you remember what time it was when you got to San Diego?

A. I forgot to tell you I stopped at the Del Mar Hotel. I was a little sleepy and I stopped at the Del Mar Hotel.

Q. Do you remember what time it was when you got to the Del Mar Hotel?

A. That must have been around . . . I couldn't tell the exact time, but it must have been around ten o'clock, maybe a little after. I wouldn't know exactly. I had no particular reason—

Q. Did you see anybody in the Del Mar Hotel you knew in Del Mar, California?

A. No. I was looking for the . . . the place was pretty well crowded Saturday evening. I was looking for a fellow I knew that is supposed to have an interest in the hotel to ask him about a reservation when the Del Mar Track opened, and I walked through the lobby

and all around the place. Just took a chance that I might catch him here.

Q. Between the time you left San Clemente and the time you stopped at the Del Mar Hotel in Del Mar, California, were you involved in any traffic accident?

A. No.

Q. You didn't get out of the car? [76]

A. No.

Q. No obstructions struck the car?

A. Not that I know of.

Q. You didn't collide with any other object?

A. Not that I know of.

Q. Now when you left the Del Mar Hotel somewhere around ten or ten-fifteen, was that it?

A. Around that time.

Q. In the evening, you drove directly to San Diego?

A. That is right.

Q. Between the time you left the Del Mar Hotel and the time you got to San Diego were you involved in any traffic accident? A. No.

Q. Did the automobile collide with any object or individual person or truck? A. No.

Q. You didn't stop and get out of the car at any time?

A. No.

Q. Do you remember passing through Solano Beach?

A. Not particularly.

Q. At any time did you adjust the headlights of the car by dimming them, cutting them off or cutting the tail light off? A. No.

Q. Was there any switch in the car by which you can [77] cut the tail lights off and leave the headlights on?

A. I don't think so. I don't know of any car that has that. I don't know, I am sure it isn't on this car.

Q. Now what time did you get to San Diego?

A. I think it was around a little before eleven or around eleven. I happened, if I remember right the clock in the police station I think was eleven o'clock when I looked at it or a little after.

Q. What happened as you drove into San Diego?

A. When I got into town a motorcycle policeman came alongside, pulled up. I saw him through the mirror coming along so I stopped. I said, "What is the matter? I am not speeding." I was going pretty slow. He said, "I am sorry, sir, but there has been an accident some miles back and we don't know whether it was a maroon car, a black car or a pink car, we are just stopping all cars that look suspicious, and your headlight is broke or something." I sat in the car. He looked all around the car with his flashlight, and then he . . . I said, "Well, what's up?" He said, "Do you mind accompanying me to the police station?" I said, "Not at all." So we drove to the police station. When we got there I left the car at the curb and we walked inside. I said, "Can't we go to the Grant Hotel?" He said, "Well, if you don't mind we will wait here a while until the Highway Patrolman comes," whatever he said, I don't exactly remember about that particular part. I said, "Well, what is it, do [78] I have to be here?" He said, "Well, yes." So I then said, "Can I use the telephone?" He said, "Help yourself." I called the manager of the Grant Hotel and I said I am a little delayed, hold on to my room, I will be there shortly, little knowing that I wouldn't. We stood on the sidewalk and talked . . . do you want me to tell you—

Q. Yes, go ahead and tell us.

A. I stood on the sidewalk and talked to the police and waited and waited what seemed to be an hour or two later when along came the Highway Patrol, Patrolman, and he jumped out of his car and he came over, three or four policemen were standing there alongside me with their motocycles in the road, and said, "Where is the job." "little job," or something, and they pointed to the car. This Highway Patrolman threw his finger at me and said, "Oh, boy, are you in for it." I said, "In for what?" He said, "You know for what." I am not going to argue with the law. I said, "What is going to happen? I don't know what the hell this is all about." I stood there waiting and waiting what seemed to be another hour, and he came out and took pictures of the car . . . oh, there before that come up, he said you know and so forth, he whipped out a pair of handcuffs and put them on me on the sidewalk. I said, "What is this for? I am only a little fellow, there are five or six policemen here, what do you expect me to do, what is this?" He said, "You will find out." I stood there with these handcuffs on me until they took the [79] pictures of the car and fooled around and finished and he came over and he took the handcuffs off, and during this time the motorcycle officer that stopped me was standing there. I says, "What is this? What happened?" "Well," he says, "it is very suspicious, it might have been your car that was in this accident." I said, "What happened, what happens now, what is the idea of the handcuffs?" He said, "Oh, don't pay any attention, those Highway Patrolmen" something, and when he finished with the pictures and everything the cop took the handcuffs off. He said, "Come on." I got in the car with them and I said, "Now

where do we go?" He said, "To the jail." We got to the County Jail and I asked the officer in the place, I said, "I have never been arrested before, isn't there something about bail? Do I have to be in here?" He said, "We can call a bondsman for you," and I said, "I wish you would, I would appreciate it." He started to call a bondsman and then this officer went into another room and I heard him telephoning and he came back and he said to the officer calling the bondsman, he said, "The Coroner says no bail." So the officer that was telephoning he said, "You heard that." I said, "Would you mind calling the man anyhow?" The bondsman finally came over. By that time it must have been three o'clock in the morning, three or three-thirty, I don't remember which, being quite upset, and I found out what happened. He said, "Well, it is kind of late to get a judge, just calm down if you don't mind, just [80] resign yourself and I will be here early in the morning. He got there around nine in the morning or nine-thirty, whatever it was.

Q. Sunday morning?

A. Sunday morning, yes, and got me out of jail, and that is that.

Q. At the time you talked to the officers did they tell you anything about the accident, what kind of an accident it was or whether anybody had been injured?

A. Yes, they said a man had been killed and a woman injured.

Q. What did you say to that?

A. I says, "Terrible."

Q. Did you at any time tell them you were or were not involved in an accident?

A. No. The only thing I told them was the headlight had been busted at the race track in Inglewood and if

there was anybody got killed or was in an accident I knew nothing about it.

Q. From the time that you first picked up the car, went to the race track, back to the hotel, and drove to San Diego was there anyone in the car with you?

A. No.

Q. Were you alone the whole time in the car?

A. Yes, I was.

Q. You didn't pick up any hitch-hikers on the street [81] or anything like that? A. No.

Q. Did you have anything to drink? A. No.

Q. Either at the race track, before you went there, or after you came back to the hotel? A. No.

Q. I mean by that drinking intoxicating liquors.

A. No.

Q. You didn't have any intoxicating liquor at any time between the time you left . . .

A. No, I don't drink much. It is not that important.

Q. You did not have anything to drink on the road?

A. No.

Q. You didn't have any whiskey, any open bottles of whiskey in the car did you?

A. I had a bottle I was bringing, which I usually do, to the, you know, manager of the hotel, Mr. McAfee, which I have brought him many many times. It is pretty hard to get a room down here and I have a friend down there where I can get it.

Q. The seal was still on that bottle? A. No.

Q. It wasn't A. No.

Q. How much was out of the bottle? [82]

A. I don't remember. Not much, very little.

Q. Now did anything else occur besides what you have told us here?

A. You asked me last night if they took and gave me a test or smelled my breath, such as that. There was nothing said at all about drinking.

Q. They didn't take you to a doctor and give you a sobriety test? A. No.

Q. They didn't make you walk a chalk line or a board on the floor or anything like that?

A. No, there wasn't the slightest inference of any drinking.

Q. No one accused you of drinking?

A. No, not a soul.

Q. Did the officers tell you how this accident happened? A. No, they didn't.

Q. Did you ask them?

A. No. All they told me was an accident; a man was killed and a woman seriously injured, something like that.

Q. Now did anything else occur that I haven't asked you about?

A. I have told you about all I know about it.

Q. You don't remember anything else at this time?

A. No, I don't.

Q. When you first came back to the car at the race [83] track did you go around to the left side of the car at all? A. No, I didn't.

Q. Was there any damage to the right hand side of the car? A. Not that I noticed.

Q. Now did you park the car when you went back to the Beverley Wilshire after you had been to the race track at the side entrance or the front entrance?

A. The side entrance.

Q. That is the north side, northwest side of the hotel?

A. You call that the west side. I always use that side, it is handiest to the elevator.

Q. At no time were you employed by the Northumberland Mining Company? A. No.

Q. This trip you took in the car belonging to the Northumberland Mining Company was for your own desires and pleasures? A. That is right.

Q. You have never been an officer, agent, servant or employee of the Northumberland Mining Company?

A. No.

Q. You weren't on any business or doing any errands for Mr. Haggerty?

A. None whatsoever. I come down here every Saturday night because I don't care to spend Sunday in Hollywood which [84] is a very quiet place. I like to go to Tia Juana and see the races have a bite there and I have been doing that ever since I have been in California, and I do it for my own pleasure. There was no business connected with it whatsoever.

Q. The only reason . . .

A. The only reason I borrowed the car was because my car was being repaired, and I told the man any time you want to borrow my car you are very welcome to it.

Q. You have known Mr. Haggerty for sometime?

A. About thirty years. He is a very find gentleman. I feel worse about his part of it. He is too sweet a person to hurt.

Q. Do you have insurance on your own car?

A. Yes.

Q. With whom is that insurance placed?

A. Through the Automobile . . .

Q. The Automobile Club of Southern California?

A. Yes.

Q. The Automobile Club of Southern California, you have a membership card number 916669. Thank you. You don't know the amount of your public liability coverage? A. No, I don't.

Q. Have you reported it to them yet?

A. I haven't had a chance. I intend to the minute I get back.

Q. That bottle of whiskey was in the bag or in the [85] glove compartment?

A. In my overnight bag. The usual procedure with that is when I arrive if Mr. McAfee is here when I arrive I give him that as a little present because it is very hard to get reservations here, if you don't mind, and I wouldn't want to insult the man by offering any money. I know he likes to take a drink once in awhile, and even though this is a hotel the kind of liquor he likes they don't have it. A very good friend of mine operates the Vendome on Beverley Drive. He is a good friend of mine and any time I want a bottle for a friend or something I get it from him.

Q. There is one thing I am not quite clear about. When you came out of the race track after the last

race to the car, from which side did you approach the car, or from the front or the back or which direction?

A. Well, the car would be facing where I was coming from. I approached it from the front.

Q. The front end?

A. That is right, like that. You approach on an angle from the steps of the place, and the first thing you see is naturally the right side of the car. As I was approaching I saw the headlight, and then I got in the car and off I went.

Q. Did you examine it very thoroughly there?

A. No, I didn't.

Q. Did you go around to the left hand side of the car at all? [86] A. No, I didn't.

Q. You just looked at the front.

A. I looked at the headlight and I said what is the use, there is nothing to examine. If you stay there half a minute there will be two hundred more cars in front of you, you know. That is the reason everybody wants to get out of there.

Q. Did you get up and look at the front end of the car? Did you get up near the center of the car in front of the radiator to look at it?

A. No, I just noticed the headlight and got in the car to get out of there.

Q. The whole time you remained on the right hand side of the car. . . . A. I got in—

Q. . . . and got in on the right hand side.

A. That is right. In other words, I was standing where the right headlight, right fender was. That is as far as I had to go to see what happened. I didn't have to go anywhere else. I just got in the car.

Mr. Menzies: I think that is all. [87]

I, R. B. Whitcomb, do hereby certify that I am a Notary Public in and for the County of San Diego, State of California, and an official shorthand reporter of the Municipal Court, City of San Diego, County of San Diego, State of California; that before taking the statement of George White he was duly sworn to testify to the truth, the whole truth, and nothing but the truth; that I reported in shorthand the questions asked and the answers given as contained in the foregoing pages numbered from 1 to 23, inclusive, and that the foregoing is a full, true and correct transcript of the same.

R. B. WHITCOMB,
Notary Public and Shorthand Reporter.

Received copy of the within Answers of Home Indemnity Company of New York, etc., this 25 day of November, 1946. Nourse & Jones, Attorneys for Defendant.

[Endorsed]: Filed Nov. 26, 1946.

Case No. vs. Plf. Exhibit.
Date 1/20/47. No. 6 in Evidence (part of) entire statement. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [90]

[Title of District Court and Cause]

INTERROGATORIES PROPOUNDED BY DEFENDANT HOME INDEMNITY COMPANY OF NEW YORK, A CORPORATION, TO PLAINTIFF.

Under and in accordance with Rule 33 of the Federal Rules of Civil Procedure defendant Home Indemnity Company of New York, a corporation, propounds and requires that plaintiff, Standard Accident Insurance Company of Detroit, a corporation, answer the following interrogatories:

1. Was the information furnished the plaintiff by defendant George White, referred to in Paragraph XIII of plaintiff's complaint, given orally or in writing?
2. If your answer to Interrogatory No. 1 is that said information was in writing, attach a full, [91] true and complete copy of said writing.
3. If your answer to Interrogatory No. 1 is that said information was furnished orally, state the name and address of the persons present, and state the substance of said report or oral information so furnished the plaintiff.
4. State the time at which said information referred to in Paragraph XIII of said complaint was furnished the plaintiff.
5. State whether or not at any subsequent time any further information, either oral or in writing, concern-

ing the accident or collision referred to in plaintiff's complaint was furnished the plaintiff by said George White. [Written in margin]: Denied.

6. If your answer to Interrogaory No. 5 is in the affirmative, state when, and the name and address of the persons to whom said subsequent information was furnished. [Written in margin]: Denied.

7. State the substance of said subsequent information, if the same was furnished orally, or attach a full, true and correct copy if the same was furnished in writing. [Written in margin]: Denied.

THOMAS P. MENZIES and
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant Home Indemnity Company of New York, a Corporation [92]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 12, 1946.

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Home Ind. Exhibit. Date 1/21/47. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [94]

[Title of District Court and Cause]

ANSWER TO INTERROGATORIES PROPOUNDED
BY HOME INDEMNITY COMPANY OF NEW
YORK TO PLAINTIFF

Under and in accordance with Rule 33, Federal Rules of Civil Procedure, plaintiff Standard Accident Insurance Company of Detroit hereby answers the interrogatories propounded by defendant Home Indemnity Company of New York:

1. In answer to the first interrogatory, it says the information was in writing.
2. In answer to the second interrogatory, it says that the following is a full, true and correct copy of the report containing the information referred to in the answer to Interrogatory No. 1:

“August 5, 1946.

Statement of George White, age 52

Address Beverly Wilshire Hotel, Beverly Hills,
Calif.

Concerning accident that occurred on July 20, 1946. Approx. ? on highway 101 near Solano Beach, Calif. [95]

“I was driving Mr. Walter Haggerty Lincoln Sedan. The car is registered in name of Northumberland Mining Co. Mr. Haggerty is an officer of the Company. The Lincoln Sedan is registered in State of Nevada. I had full permission to drive the car from Los Angeles to San Diego as my car was in the repair shop.

"I left Los Angeles approx 6:30 P M on July 20, 1946 and drove at average rate of speed. At San Clemente Calif. at a Cafe / and had 2 cups of (drive in) coffee.

[end of first page] [Signed] George White

"Page 2

"I was alone in the car. I had driven on considerable distance, when I must have dozed off to sleep for a moment. The next thing I remember my car was at almost a stand still on the highway, I looked around a moment without getting out of the car then put car in low gear and proceeded on to San Diego. I had entered the City of San Diego when Officers stopped me and took me to Police Station without telling me what I was being taken in for except that there had been an accident and they were stopping all car.

"Later I was booked for hit & run and suspicion of manslaughter. Atty Thomas P. Menzies, 548 So Spring St and L. E. Clifton (Claim Adjuster) and representing the Home Indemnity Co. of New York, insurance carriers for the Northumberland Mining Co. My insurance with Standard Accident is on a 1942 Packard Coupe

[Signed] George White"

3. In answer to Interrogatory No. 4, plaintiff states that said information was furnished on August 5, 1946.

4. In answer to Interrogatories Nos. 5, 6 and 7, plaintiff states that no further statement or information was furnished to it by George White, except that after the

commencement of this action, [96] Paul Nourse, an attorney of record for this plaintiff in this action, did interview said George White at the San Diego County Industrial Road Camp, on the 9th of September, 1946, and that said George White did make an oral statement concerning the accident or collision referred to in the complaint on file herein, and this plaintiff claims that said statement so made to Paul Nourse was and is privileged.

STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT

By Freeman Reed

District Claims Manager

NOURSE & JONES

By Paul P. Nourse

Attorneys for Plaintiff [97]

[Verified] [98]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 17, 1946. [99]

[Minutes: Monday, December 23, 1946]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for (1) hearing on objections of the Standard Accident Insurance Co. of Detroit to interrogatories propounded by defendant Home Indemnity Co. of New York to plaintiff, pursuant to notice filed Dec. 17, 1946; and (2) hearing on oral objections of

plaintiff to request for admissions made by the Home Insurance Co. of New York, pursuant to notice filed Dec. 17, 1946; John Lindley, Esq., of the law firm of Nourse & Jones, appearing as counsel for the plaintiff; Thos. P. Menzies, Esq., appearing as counsel for the defendants:

Attorney Lindley argues re (1) said interrogatories and objects to interrogatories 5, 6, and 7. Attorney Menzies argues. The Court makes a statement, and orders that Interrogatories 5, 6, and 7 be answered by the Standard Accident Insurance Co. Attorney Lindley argues in opposition to request for admissions. Attorney Menzies makes a statement re admissions. The Court makes a statement. It is ordered that objections to interrogatories 5, 6, and 7 are overruled.

Attorney Lindley argues re (2) oral objections of plaintiff to request for admissions made by the Home Insurance Co., and Attorney Menzies argues. The Court makes a statement. With respect to the oral objections of the plaintiff to the request for admission made by the Home Insurance Co. of New York the Court states that it [100] is going to compel the plaintiff to answer the question with reference to the waiver, that the application for probation is a public document, and, if properly verified, will be admissible, and that the plaintiff will not be required to answer those requests other than the one indicated by the Court. Five days to answer. Notice is waived. [101]

[Title of District Court and Cause]

FURTHER ANSWER TO INTERROGATORIES
PROPOUNDED BY HOME INDEMNITY
COMPANY OF NEW YORK TO PLAINTIFF

Comes now plaintiff, Standard Accident Insurance Company of Detroit, and by leave of court first had files this its further answer to the interrogatories propounded to it by defendant, Home Indemnity Company of New York.

1. Answering Interrogatory No. 5, it answers, Yes.
2. Answering Interrogatory No. 6, it says: That an oral statement was made by George White to Paul Nourse, attorney for plaintiff whose address is 1017 Rowan Building, Los Angeles, California, on September 9, 1946; that the substance of said oral statement made to Paul Nourse on September 9, 1946, is as follows:

Mr. Menzies came to see me before I had a lawyer, I think the day after the accident happened. I was in a very upset state of mind. I told him the story as well as I could [102] remember it.

When I talked to him I would have sworn the car I was driving didn't hit anybody. By the time I had talked to John Holt and he showed the evidence that somebody had been hit or something, I told him it must have happened when I dozed off. He asked me if I had told Menzies that I dozed off, and I told him that I didn't know, that I thought I had, but I was not sure. So he told me to tell Menzies. I did tell Menzies, but I am not sure of the date, and I am not sure whether I told Menzies first or Holt did. At a later time, I do not remember the exact date, I was in Menzies' office, and I

again told him that I had dozed off and I wanted to put that in the statement I had given him.

When I first met Mr. Menzies it was in the Grant Hotel, and we talked for a long time until late at night. I was very upset, I didn't know what to do or where I was at and I thought I was being accused falsely. I believe that happened on Monday after the accident, although it might have been Sunday.

After our first talk, I met him at 9:00 o'clock the next morning in his room and he had a stenographer there. He told me to tell him what had happened, and I told him to the best of my knowledge, but I didn't tell him I had dozed off. At that time I was convinced that I hadn't hit anybody, and the fact that I had dozed off on my trip didn't seem important. As I now remember it what occurred is as follows:

On Saturday, July 22, 1946, I met Audrey Young and her father at the Beverly-Wilshire Garage. I was driving Walter Haggerty's car. Audrey got in and we drove to the Inglewood race track. I parked the car in the Turf Club parking area. In my haste to get to the first race, I forgot to take the key out of the car. After the last race we rushed out to beat the traffic, which is quite terrific on Saturdays. We went to [103] the spot where I had parked the car, but it was not in that place, but seemed to be about a dozen yards or so further down. As I approached the car I noticed the glass in the left headlight was broken. I wasn't sure whether it had been broken in the parking station or the night before, although I hadn't noticed it.

I dropped Miss Young off on Wilshire and Rodeo, and drove to the side entrance of the Beverly-Wilshire Hotel.

I went up, washed up, packed an overnight bag, and left for San Diego at about 6:30 P. M. I stopped and picked up sandwiches at Nate and Lou's Delicatessen on Beverly Drive, and I bought a San Diego Examiner from a newsboy at the Brown Derby corner. I drove over to Olympic and then on Overland Avenue to Sepulveda. I ate my sandwiches and drank some coca cola and kept going until I got to San Clemente, where I stopped at a drive-in and drank two cups of coffee. I felt a little tired from running up and down steps at the races, but did not feel sleepy.

Suddenly I came to, I realized I must have dozed off. My car was moving very slowly, it was pitch dark and there wasn't a person in sight. I grabbed the wheel, shifted into low gear, and rolled on again. I thought at the time, its a wonder I didn't run off the road, and how lucky I was to avoid an accident. I didn't know where I was at the moment, but shortly after that I saw familiar parts of the road, the northern entrance to the Del Mar race track.

I stopped at the Del Mar Hotel to see if Lew Irwin was there. He had told me a few days previous he was connected with the Hotel. I wanted to arrange to stay there for the Del Mar race meet. On arriving at the Del Mar Hotel I left my car in the driveway, I looked in the bar, in the lobby and around the grounds and did not find Lew Irwin. I was probably there about 10 or 15 minutes. I got back into my car on the righthand [104] side and continued on to San Diego. I did not at any time that evening go around in front of my car. I always get out the right side, it is dangerous otherwise.

I continued on towards San Diego at a fairly slow rate of speed with my radio on very loud so I wouldn't doze again. As I approached San Diego a motorcycle followed me. I saw the red lights through the mirror as he approached. I pulled over to the side of the road and he came up. I said, "What's up, I certainly am not speeding." He said, "No, it is not that; there has been an accident some miles back, and we are stopping all cars that look suspicious. Your headlight is damaged." I said, "That was done at Santa Anita." I meant to say, "Inglewood." I was still sleepy. The officer took out his flashlight and walked to the front of the car and examined it. I sat in the car. The officer said, "Your car looks kind of suspicious. Would you mind accompanying me to the police station?" I told him "Not at all, I will be glad to." I drove to the police station and stopped near the corner of the station. There were several motorcycles in front of the door. It was very dark there. I got out on the righthand side. An officer told me we would have to wait until the Highway Patrolman arrived. I called the Assistant Manager of the U. S. Grant Hotel and told them to hold my room, that I would be there in about 20 minutes. That was about 11:00 P. M. Sometime later, it seemed a couple of hours, the Highway Patrolman arrived, and he ran over to me and said, "Is this him?" And then to me he said, "Oh, boy, are you in for it." I said, "I don't know what the hell you are talking about." He says, "What about those two people you hit on the highway? Fifteen years in San Quentin for you." He put a pair of handcuffs on me. After some time a wrecking car arrived and towed my car away. I still did not see any damage to the car

because the [105] damage was all on the left side and that was not visible to me at any time.

After I had left the car at the corner of the station I was not closer to it than about 20 feet and its right side was towards me.

The Highway Patrolman took me to the County Jail and I was booked. They told me the Coroner said no bail was to be allowed until he had investigated. I stayed in jail until the next morning when bail was arranged.

When I stopped at the Del Mar Hotel I didn't see anyone I knew.

I had nothing to drink at all on the evening of the accident, nor at the races. I had two bottles of liquor in the car, one partially filled, and I was bringing it down to Mr. Val, the other bottle was for Mr. McAfee. I only take a drink about once a month.

I was arraigned on Monday morning.

I was all alone on the trip down from Los Angeles to San Diego.

Mr. Menzies did not give me a copy of the transcript of my statement which was taken at the Hotel Grant. He wanted me to sign a copy of it in his office, but I told him that Mr. Holt had told me not to sign anything unless he saw it.

Mr. Menzies sent to my attorney, Mr. Holt, answers for me to sign in the suits that were brought against me. As I remember it, these contained statements that I had not struck these people, but by that time I knew I had and I wouldn't sign them. Mr. Holt advised me not to sign them.

When I woke up on the highway my car was on the righthand side, moving along very slow, that is my best recollection.

When I got into the car after the races it was broad daylight, so I didn't have to turn the lights on. The damage [106] to the headlight that I saw at the races was only a crack of the headlight. It was nothing like the damage to the headlight which was shown in the pictures of the car in the newspaper.

After I woke up I didn't notice any difference in the light from my headlights. I might have been groggy or something. I was very tried, I had worked until 3:00 or 4:00 o'clock in the morning on Saturday morning. I was preparing a show and I do a good deal of the writing of my shows, in fact most of it. I only had four or five hours sleep. After I awoke after dozing off, I drove on at a speed of 25 or 30.

I had a talk with the Probation Officer at San Diego before my probation hearing. He said that it might go easier with me if I would admit that I knew that I hit these people, and asked me if I didn't feel anything even though I had fallen asleep. He asked if it wasn't the impact that woke me up, and I said "Evidently it was." He said, "You know, if you tell the truth it will be much simpler for you," or words to that effect, and I told him that if he had the Judge and the District Attorney right there and they would say I would go free if I said

I knew I hit the people, I would say, "O. K., I hit the people, but I am lying when I tell you I knew I hit them."

When I gave my statement to Mr. Menzies I had not seen the pictures of the car. When he took my statement he said he was there to help me, that I should tell him everything I could, tell him the truth, that no matter what I told him it would be just between he and I. I didn't tell him I had fallen asleep because that didn't seem important to me then, but after I saw the pictures of the car I was convinced that it was my car that hit the people, and the only way I could account for it was that it hit them when I dozed off. I am not sure when I first told Menzies I had dozed off, but it was before any answers to the state court suits were prepared, and I also [107] told him before they were prepared that I believed it was my car that had hit the people.

Dated: December 27, 1946.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [108]

[Verified] [109]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 28, 1946.

Case No. 5729 Civ. vs. Deft. Exhibit. Date 1/20/47. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [110]

[Title of District Court and Cause]

REQUEST FOR ADMISSIONS UNDER RULES OF
CIVIL PROCEDURE—RULE 36

To the Plaintiff, Standard Accident Insurance Company of Detroit, a Corporation, and

To Nourse and Jones, Its Attorneys:

The defendant Home Indemnity Company of New York, a corporation, hereby requests the plaintiff, Standard Accident Insurance Company of Detroit, a corporation, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

1. That each of the following statements is true:

- (a) That defendant George White gave Home Indemnity Company of New York, a corporation, a statement [111] concerning the cause of the accident referred to in plaintiff's complaint.
- (b) That said statement was made on July 23, 1946, in the presence of Mr. Thomas P. Menzies, Mr. L. E. Clifton and Mr. R. B. Whitcomb.
- (c) That prior to making said statement defendant George White was sworn by said R. B. Whitcomb to testify to the truth, the whole truth and nothing but the truth.
- (d) That the statement of said defendant George White was reported in shorthand by the said R. B. Whitcomb and thereafter transcribed.

(e) That the transcript of said statement furnished the plaintiff in answer to Interrogatory No. 10 of plaintiff's interrogatories to this defendant is a full, true and correct copy of said transcribed statement of defendant George White, and is a full, true and correct copy of the transcript of the statement so made by defendant George White on July 23, 1946.

2. That in a hearing on application for probation held August 23, 1946, in the Superior Court of the State of California, in and for the County of San Diego, in the Matter of the People of the State of California, Plaintiff, vs. George White, Defendant, before Honorable Judge Joe L. Schell of the Superior Court, the defendant, George White, stated as follows:

- (a) That it was a fact that he was unaware that he (the said White) had hit anybody in the vicinity of Solano Beach.
- (b) That "I fell asleep; that is a fact."
- (c) That he (the said White) did not at the time notice the indentation on the hood of his car. [112]
- (d) That he did not notice the condition of the headlight on his car.
- (e) That he did not know that he had hit anybody.
- (f) That at said proceedings on the hearing on application for probation the said Superior Court Judge Honorable Joe L. Schell said to the defendant George White, "How can we do otherwise than to say that Mr. White knew that he hit somebody, and that he drove off."

That defendant George White made no response to the statement of said Superior Court Judge.

3. That defendant George White stated orally to Thomas P. Menzies, Esq., and L. E. Clifton, Esq., on July 22, 1946, at San Diego, California, that he (the said White) had not been involved in an accident and had no knowledge of having struck anyone with the automobile which he was operating.

4. That the statement referred to in the preceding paragraph is false.

5. That the said George White on July 23, 1946, made the following false statements in connection with and as a part of his sworn statement before R. B. Whitcomb:

- (a) That the damage to the left front fender of the car of the Northumberland Mining Co., which defendant White was driving, occurred at the Hollywood Park Race Track.
- (b) That when he (the said White) came out of the Race Track the left headlight was broken and bashed in and that the damage to the car of the Northumberland Mining Co. was done while the car was parked at the Hollywood Park Race Track.
- (c) That between the time he (the said White) left [113] a drive-in stand in the City of San Clemente and the time that he arrived in the City of San Diego, he did not hit any pedestrian or other object on the road.
- (d) That between the time he (the said White) left San Clemente and the time that he left the Del Mar Hotel in Del Mar, California, he was not involved in any traffic accident.

- (e) That the automobile operated by him (the said White) did not collide with any object or individual person.
- (f) That he (the said White) did not know that he had hit anyone.
- (g) That if anybody got killed it was an accident and he (the said White) did not know anything about it.
- (h) That "I have told you all I know about it."

6. That on July 26, 1946, defendant The Home Indemnity Company of New York entered into an agreement of non-waiver and reservation of rights with the defendant George White in writing, in words and figures as per Exhibit "A" attached hereto and made a part hereof.

7. That said agreement of non-waiver and reservation of rights was executed prior to The Home Indemnity Company of New York filing, or causing to be filed, answer on behalf of George White in Superior Court Actions No. 134918 and No. 134630 in the Superior Court of San Diego County.

Dated this 11th day of December, 1946.

THOMAS P. MENZIES and
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant Home Indemnity Company of
New York, a Corporation [114]

EXHIBIT "A"

AGREEMENT OF NON-WAIVER AND RESERVATION OF RIGHTS

It Is Hereby Mutually Agreed, by and between The Home Indemnity Company of New York, and George

White, under their Policy No. CAU 6011452, that in the signing of this agreement, or the investigation or defending of any action at law or in equity arising out of an accident which is alleged to have occurred on or about the 20th day of July, 1946, in the County of San Diego, near Solano Beach, and that in investigating any and all of the facts and circumstances surrounding said accident, and any and all claims of any and every nature whatsoever for personal injuries and property damage arising out of said accident, each party to this agreement specifically reserves unto themselves each and every right and defense which either may have pursuant to the terms and conditions of the above numbered policy of insurance; and that neither party to this agreement shall waive or invalidate any of the terms or conditions of said policy or policies of insurance, and shall not waive or invalidate any rights which either may have of any nature whatsoever, and that each party to this agreement specifically reserves each and every and all and singular rights and defenses which each may have by reason of the terms and conditions of said policy or policies of insurance above numbered herein.

Dated this 26th day of July, 1946, at Los Angeles, California.

THE HOME INDEMNITY COMPANY
OF NEW YORK

By L. E. Clifton

George White

(George White) [115]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 12, 1946. [117]

[Title of District Court and Cause]

ANSWER OF PLAINTIFF TO REQUEST FOR
ADMISSIONS UNDER RULES OF CIVIL PRO-
CEDURE—RULE 36

Comes now plaintiff, Standard Accident Insurance Company of Detroit, a corporation, and in answer to Request for Admissions heretofore served and filed by Home Indemnity Company of New York, makes answer as follows:

1(a). To Request 1(a) this plaintiff answers that it is informed and believes that the defendant George White gave defendant Home Indemnity Company of New York a statement concerning the causes of action referred to in plaintiff's complaint.

1(b). To Request 1(b) this plaintiff says that a statement was not made in its presence or in the presence of any of its officers, attorneys, agents or employees, and it therefore does not know and cannot truthfully state whether or not said statement was made on July 23, 1946, or whether the same was made in the presence of Thomas P. Menzies, L. E. Clifton, or R. B. Whitcomb. [118]

1(c). To Request 1(c) this plaintiff states that neither it nor any of its servants, agents, employees or attorneys were present at the making of said statement, and therefore it cannot state whether or not prior to making said statement George White was sworn by R. B. Whitcomb to testify to the truth, the whole truth, and nothing but the truth.

1(d). To Request 1(d) this plaintiff says that it has no information as to whether or not said statement was

reported in shorthand by R. B. Whitcomb and thereafter transcribed, except that it is so informed by the Answers of defendant Home Indemnity Company of New York to the interrogatories propounded by this plaintiff.

1(e). To Request 1(e) this plaintiff states that it has no information relative to whether or not the transcript attached to defendant Home Indemnity Company's Answers to Interrogatories and Answer to Interrogatory No. 10 is a full, true and correct copy of the transcribed statement of defendant George White, but this plaintiff offers to stipulate at the trial of this action, that if the original transcript of said statement certified to by said R. B. Whitcomb, Notary Public and shorthand reporter, is produced by defendant Home Indemnity Company of New York, that said Whitcomb, if called as a witness, would testify that said transcript is a full, true and correct copy of the questions propounded to George White and answers given by George White on the 23rd day of July, 1946, and that said questions and answers were asked and given.

2(a), (b), (c), (d), (e), (f). To Requests 2(a) to (f), inclusive, this plaintiff states that neither it nor any of its agents, servants, employees or attorneys were present at the application for probation held on August 23, 1946, in the Superior Court of the State of California, in and for the County of San Diego, in the Matter of the People of the State of California, Plaintiff v. George White, defendant, and that therefore it has no knowledge as to whether or not the statements recited in said request for admissions were made or not made. [119]

If a transcript of all of the proceedings had at said hearing on application for probation, certified to by the

official Court Reporter present at said hearing, is produced at the trial of the above entitled action, this plaintiff will stipulate that the questions shown by said transcript as asked and the answers given to the questions and any statements made by the court, attorneys, officers or witnesses, were made at said hearing, reserving however, the right to object to the admissibility of said questions, answers or statements in evidence at the trial of this action, upon the grounds that the matter offered in evidence is irrelevant, upon the grounds that it is immaterial, upon the grounds that it is hearsay, and upon the grounds that it calls for a conclusion of the witness, with the same force and effect as if the persons asking the questions, making the answers, or making the statements offered were present as witnesses.

3. To Request 3 this plaintiff states that neither it nor any of its agents, servants, employees or attorneys were present at the occurrence described in Request No. 3, and therefore it has no knowledge as to whether or not the statements therein alleged to have been made by White were made, and therefore cannot under oath state whether or not they were made.

4. To Request 4 this plaintiff states that if defendant George White made the statement recited in Request for Admission No. 3, it cannot state whether or not said statement was false or untrue, but this plaintiff is informed that if White made the statement that he had not been involved in an accident, that statement was untrue, but that if he made the statement that he had no knowledge of having struck anyone with the automobile which he was operating, that that statement was true. [120]

5(a), (b), (c), (d), (e), (f), (g), (h). To Requests 5(a) to (h), inclusive, this plaintiff states that if George White made the statements which are recited in said Requests for Admission, this plaintiff is unable to state whether or not said statements were false or untrue, and this plaintiff further states that the question as to whether or not said statements were false or untrue is one of the direct issues of fact to be determined by the court herein from all of the evidence.

6 and 7. To Requests 6 and 7 this plaintiff says that it has no knowledge whatsoever as to the instrument annexed to the Request for Admissions, marked Exhibit A, or as to the execution thereof; that it has not seen said instrument and is therefore unable to state whether or not the copy attached is a true copy of an original instrument, or whether or not the original thereof was executed by George White, or of the circumstances under which the same, if executed, was executed.

STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT

By Freeman Reed

District Claims Manager

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [121]

[Verified] [122]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 17, 1946. [123]

[Title of District Court and Cause]

ANSWER TO REQUEST FOR ADMISSIONS
FILED BY DEFENDANT HOME INDEMNITY
COMPANY OF NEW YORK

To Defendant, Home Indemnity Company of New York,
and

To Messrs. Thomas P. Menzies and Harold L. Watt, Its
Attorneys, Notice:

Comes now plaintiff, Standard Accident Insurance Company of Detroit, and by leave of court first had files this its further answer to the Request for Admissions heretofore filed by defendant, Home Indemnity Company of New York:

1. Answering the 6th request for admissions, states: That it has not seen and has no knowledge of the instrument, an alleged copy of which is annexed to said Request for Admissions and marked Exhibit A, except that it is advised by the attorneys for defendant, Home Indemnity Company of New York, that such an instrument was executed by defendant, Home Indemnity Company of New York, and defendant, George White; and on the basis of such information and [124] in order to comply with the ruling of the court herein, admits that said instrument was so executed.

2. Answering the 7th request for admissions, this plaintiff admits that if Exhibit A attached to the Request for Admissions filed by defendant Home Indemnity Company of New York herein was executed on the 26th day of July, 1946, it was executed prior to the filing of the answers on behalf of George White in the Superior

Court actions Numbers 134918 and 134630 in the Superior Court of San Diego County.

Dated: December 27, 1946.

NOURSE & JONES
By Paul Nourse
Attorneys for Plaintiff [125]

[Verified] [126]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 28, 1946. [127]

[Title of District Court and Cause]

REQUEST FOR ADMISSIONS UNDER RULE 36,
FEDERAL RULES OF CIVIL PROCEDURE

To Defendant, Home Indemnity Company of New York,
a corporation, and

To Messrs. Thomas P. Menzies and Harold L. Watt,
Its Attorneys:

Plaintiff hereby requests that within not more than ten days from the date of the service of this Request, defendant Home Indemnity Company of New York make the following admissions for the purposes of this action only, and subject to all pertinent objections as to admissibility which may be interposed at the trial:

1. That the instrument attached hereto and marked "Exhibit A" is a full, true and correct copy of an answer which said defendant requested the defendant, George White, to sign and verify in that certain action in the

Superior Court of the State of California, in and for the County of San Diego, entitled "James Carl Fitzgerald v. George White, et al.," numbered 134630 in the files of said court. [128]

2. That said defendant, George White, refused to verify said answer annexed hereto and marked "Exhibit A," and informed the defendant, Home Indemnity Company of New York, or its attorney, Thomas P. Menzies, Esq., that he would not verify the same because it denied the occurrence of the accident which is described in the complaint in said action.

3. That the instrument annexed hereto and marked "Exhibit B" is a full, true and correct copy of an answer signed and verified by said defendant, George White, in said action in the Superior Court of the County of San Diego, which is referred to and described in Request No. 1.

4. That said Exhibit B, after being signed and verified by George White, was delivered by him or in his behalf to Thomas P. Menzies, Esq., an attorney employed by defendant, Home Indemnity Company of New York, to defend said action.

5. That said Thomas P. Menzies, Esq., caused said answer, Exhibit B, to be filed in the action in which it is entitled.

6. That the instrument annexed hereto, made a part hereof and marked "Exhibit C," is a full, true and correct copy of the complaint filed in the action in the Superior Court of the County of San Diego, which is referred to and described in Request No. 1.

7. That the instrument attached hereto and marked "Exhibit D" is a full, true and correct copy of an answer

which said defendant requested the defendant, George White, to sign and verify in that certain action in the Superior Court of the State of California, in and for the County of San Diego, entitled "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their guardian ad litem, Plaintiffs v. George White, et al., Defendants," numbered 134918 in the files of said court.

8. That said defendant, George White, refused to verify said answer annexed hereto and marked "Exhibit D," and informed the defendant, Home Indemnity Company of New York, or its attorney, [129] Thomas P. Menzies, Esq., that he would not verify the same because it denied the occurrence of the accident which is described in the complaint in said action.

9. That the instrument annexed hereto and marked "Exhibit E" is a full, true and correct copy of an answer signed and verified by said defendant, George White, in said action in the Superior Court of the County of San Diego, which is referred to and described in Request No. 7.

10. That said Exhibit E, after being signed and verified by George White, was delivered by him or in his behalf to Thomas P. Menzies, Esq., an attorney employed by defendant, Home Indemnity Company of New York, to defend said action.

11. That said Thomas P. Menzies, Esq., caused said answer, Exhibit E, to be filed in the action in which it is entitled.

12. That the instrument annexed hereto, made a part hereof and marked "Exhibit F," is a full, true and correct copy of the complaint filed in the action in the Su-

perior Court of the County of San Diego, which is referred to and described in Request No. 7.

13. That in connection with the accident described in the complaint on file herein the District Attorney of the County of San Diego, State of California, did issue a complaint in an action entitled, "People of the State of California v. George White," charging George White with a violation of Section 480 of the Vehicle Code of the State of California, and that on the 31st day of July, 1946. George White did enter a plea of "Guilty" to said charge.

14. That at the time of requesting defendant, George White, to verify the answers annexed hereto and marked, respectively, "Exhibit A" and "Exhibit D," the defendant, Home Indemnity Company of New York, and its attorney, Thomas P. Menzies, Esq., knew that the plea of "Guilty" referred to in Request No. 13 had been entered by the defendant, George White. [130]

15. That the copy of a letter annexed hereto and marked "Exhibit G" is a true and correct copy of a letter written by Thomas P. Menzies to the defendant herein, George White.

16. That the copy of a letter annexed hereto and marked "Exhibit H" is a full, true and correct copy of a letter written by Thomas P. Menzies to John T. Holt.

17. That the copy of a letter annexed hereto and marked "Exhibit I" is a full, true and correct copy of a letter written by Thomas P. Menzies to defendant herein, George White.

18. That the copy of a letter annexed hereto and marked "Exhibit J" is a full, true and correct copy of

a letter written by John T. Holt to Thomas P. Menzies and received by Thomas P. Menzies.

19. That neither you nor Thomas P. Menzies made any reply to the letter of John T. Holt annexed hereto and marked "Exhibit J."

20. That at all times from July 20, 1946, to and including August 23, 1946, Thomas P. Menzies was acting as attorney for you.

21. That in writing the letters annexed hereto and marked "Exhibit G" and "Exhibit H" and "Exhibit I," Thomas P. Menzies was acting in your behalf.

22. That John T. Holt was, on the 23rd day of August, 1946, attorney for defendant herein, George White, and as such attorney and on behalf of George White, wrote to you the letter, copy of which is annexed hereto, marked "Exhibit J."

23. That the statement in the letter, copy of which is annexed hereto, marked "Exhibit J,"

"As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections."

is a true statement of the facts related therein. [131]

24. That the statement in the letter, said Exhibit J, that:

"* * * several days after this and a very short time the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then."

is a true statement of the statements made to you by George White and of the time of the making of said statements.

25. That the statement in said letter, marked "Exhibit J," herein, that:

"* * * several days after this and a very short time after the accident itself, you and I talked by telephone and I asked you to remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge."

is a true statement as to the facts related to you through your attorney, Thomas P. Menzies, Esq., over the telephone at the time indicated in the quoted statement.

26. That the defendant, Home Indemnity Company of New York, is now and has at all times since the 19th day of July, 1946, been solvent and financially able to pay the claims made against George White by plaintiffs in actions numbers 134630 and 134918 in the Superior Court of the State of California, in and for the County of San Diego, as set forth in the copies of the complaints in said actions, Exhibits C and F annexed hereto.

Dated: December 23, 1946.

NOURSE & JONES

By Paul Nourse

Attorneys for Plaintiff [132]

EXHIBIT A

In the Superior Court of the State of California,
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his
Guardian ad Litem, James Richard Osborne, and James
Richard Osborne, Plaintiffs, vs. George White and North
Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering
for himself only the plaintiffs' complaint on file herein,
admits, denies and alleges as follows, to-wit:

I.

Answering Paragraph I of plaintiffs' complaint defendant
has not sufficient information or belief upon which
to base an admission or denial of the allegations contained
in said Paragraph I and basing his denial upon
those grounds denies each and every and all and singular
the allegations contained in said Paragraph I, save and
except the allegation that James Richard Osborne is the
Guardian Ad Litem of said minor plaintiff.

II.

Answering Paragraph II defendant denies each and
every [133] and all and singular the allegations contained
in said Paragraph II, save and except that this answering
defendant admits that the Northumberland Mining
Company was the owner of said automobile described in
said paragraph and that the defendant was operating
said automobile with the consent of the president of said
company.

III.

Answering Paragraph III of plaintiffs' complaint defendant denies that on July 20, 1946, or at any other time or at all, in the County of San Diego, State of California, on U. S. Highway No. 101, at and near Solano Beach, or in the County of San Diego, State of California, or elsewhere, or at all, on U. S. Highway No. 101, at and near Solano Beach, or on U. S. Highway No. 101, at or near Solano Beach, or elsewhere or at all, the defendant George White did carelessly, recklessly and negligently, or did carelessly or recklessly or negligently, drive, steer, operate and cause to be propelled, or drive or steer or operate or cause to be propelled, the said automobile into, upon and against, or into or upon or against, one Leana Mae Osborne Lee, the mother of plaintiff James Carl Fitzgerald. Denies that as a result, proximate or otherwise, of which carelessness, recklessness and negligence, or which carelessness or recklessness or negligence, the said Leana Mae Osborne Lee was caused to and did suffer her death, or was caused to or did suffer her death.

IV.

That this defendant has not knowledge, information or belief sufficient to enable him to answer the allegations in Paragraph IV of said complaint and basing his answer on that ground denies the same.

V.

Answering Paragraph V of plaintiffs' complaint defendant denies each and every and all and singular the [134] allegations contained in Paragraph V. Denies that the minor plaintiff was damaged in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum whatsoever by reason of any acts whatsoever of this answering defendant.

Answering Paragraph I of plaintiffs' second cause of action, defendant hereby refers to and adopts as his answer the denials and allegations heretofore set forth in said defendant's answer to said Paragraphs II and III of the first cause of action herein as fully as though herein set out at length.

Answering Paragraph II of plaintiffs' second cause of action, defendant has not knowledge, information or belief sufficient to enable him to answer and basing his answer on that ground denies generally and specifically, each and every, all and singular, the allegations contained in paragraph numbered II of plaintiffs' second cause of action.

Further Answering Plaintiffs' Said Complaint and for a Separate and First Special Defense Thereto, This Answering Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety. Wherefore, defendant prays that the plaintiffs take nothing by their said action and that defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and

HAROLD L. WATT

By.....

Attorneys for Defendant George White

Case No. vs. Plf. Exhibit. Date 1/21/47. No. 12 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [135]

EXHIBIT B

In the Superior Court of the State of California
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his
Guardian ad Litem, James Richard Osborne, and James
Richard Osborne, Plaintiffs, vs. George White, and North
Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant, George White, and answering
the complaint on file herein for himself and not on
behalf of his co-defendant, admits, denies and alleges as
follows, to-wit:

I.

Alleges that this defendant has not information or
belief sufficient to enable him to answer the allegations
of paragraphs I, IV and V of the first alleged cause
of action and paragraph II of the second alleged cause
of action of the complaint on file herein, and for want
of such information and belief and basing his denial on
that ground denies each and all of the allegations of said
paragraphs and the whole thereof.

II.

Denies that the plaintiff, James Carl Fitzgerald has
been damaged in the sum of Fifty Thousand Dollars
(\$50,000.00), or in [136] any sum, or at all; denies that
the plaintiff James Richard Osborne has been damaged
in the sum of Five Hundred Dollars (\$500.00), or in
any other sum, or at all.

III.

Answering paragraph II of the first alleged cause of action set forth in the complaint on file herein, this defendant denies generally and specifically each and all of the allegations of said paragraph, except this defendant admits that the Lincoln Zephyr automobile described in said paragraph was at the time of the accident described in the complaint, owned by the defendant, North Lumberland Mining Company, and this defendant was at the time and place of the accident driving said automobile with the full knowledge and consent of said North Lumberland Mining Company.

IV.

Answering paragraph III of the first alleged cause of action of the complaint on file herein this defendant denies generally and specifically each and all of the allegations of said paragraph, except that this defendant admits that the automobile driven by him did at or about the time and place described in the complaint, collide with Leana Mae Osborne Lee and that as a result of said collision Leana Mae Osborne Lee died, and except that this defendant has not information and belief sufficient to enable him to answer the allegations of said paragraph that said Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald, and for want of such information and belief and basing his denial on that ground denies that Deana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald.

And for a Further and Separate Defense to Each of the First and Second Causes of Action Set Forth in the Complaint on File Herein This Defendant Alleges: [137]

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and
HAROLD L. WATT

By [Signed] Thomas P. Menzies
Attorneys for Defendant George White

State of California,
County of Santa Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

[Signed] GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

[Signed] GAYLE H. DAVIS
Notary Public in and for said County and State [138]

EXHIBIT C

In the Superior Court of the State of California
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his
Guardian ad litem, James Richard Osborne, and James
Richard Osborne, Plaintiffs, vs. George White and North
Lumberland Mining Company, Defendants.

COMPLAINT

FIRST CAUSE OF ACTION

Plaintiff James Carl Fitzgerald complains and alleges:

I.

That plaintiff James Richard Osborne is the grandfather of plaintiff James Carl Fitzgerald; that said last mentioned plaintiff is a minor of the present age of eighteen months; that plaintiff James Richard Osborne is the duly appointed and acting guardian ad litem of said minor plaintiff herein.

II.

That at all times herein mentioned, defendant North Lumberland Mining Company was the owner of a certain Lincoln Zephyr automobile driven, steered, operated and caused to be propelled with the full knowledge, consent and permission of said defendant company by defendant George White, and that the said defendant George White was at all times herein mentioned the servant, agent and employee of the said defendant company acting within the scope of his agency and authority as such servant, agent and employee.

III.

That on July 20, 1946, in the County of San Diego, State of California, on U. S. Highway No. 101, a public highway, at and near [139] Solano Beach, defendant George White did carelessly, recklessly and negligently drive, steer, operate and cause to be propelled the said automobile into, upon and against one Leana Mae Osborne Lee, the mother of plaintiff James Carl Fitzgerald as a proximate result of which carelessness, recklessness and negligence the said Leana Mae Osborne Lee was caused to and did suffer her death.

IV.

The said minor plaintiff James Carl Fitzgerald is the sole heir at law of the said Leana Mae Osborne Lee.

V.

That by reason of the foregoing said minor plaintiff has been deprived of the society, services, comfort, support, nurture, counsel guidance, protection and ability in training, educating and rearing him, to his great loss and damage in the sum of Fifty Thousand Dollars (\$50,000.00).

SECOND CAUSE OF ACTION

I.

Plaintiff hereby refers to and adopts as part of this, the second cause of action, each and all of the allegations in paragraphs II and III of the first cause of action herein.

II.

That plaintiff James Richard Osborne is the father of the said Leana Mae Osborne Lee, deceased; that the said Leana Mae Osborne Lee was at all times herein mentioned a minor of the age of 18 years; that by reason

of the foregoing, this plaintiff has been obliged to incur and he has incurred liability and expense for the preparation of the body of the said Leana Mae Osborne Lee for burials and for her funeral and burial in an amount which said plaintiff is informed and believes and therefore alleges to be in the sum of Five Hundred Dollars (\$500.00) the reasonable value thereof.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, as follows: [140]

1. In favor of plaintiff James Carl Fitzgerald in the sum of Fifty Thousand Dollars (\$50,000.00) by virtue of the first cause of action herein, and
2. In favor of the plaintiff James Richard Osborne in the sum of Five Hundred Dollars (\$500.00) by virtue of the second cause of action herein, and
3. In favor of plaintiffs for their costs herein incurred and expended, and
4. For such other and further relief as to the court seems just and proper in the premises.

[Signed] EDGAR B. HERVEY

Attorney for Plaintiffs [141]

State of California

County of San Diego—ss

Edgar B. Hervey, being first duly sworn, deposes and says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in San Diego, San Diego County, California, and is the attorney for the plaintiffs in the above entitled action; that plaintiff James Richard Osborne is unable to make the verification because he is absent from said county, and for that reason affiant makes this verification

on plaintiff's behalf; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

[Signed] EDGAR B. HERVEY

Subscribed and sworn to before me this 22nd day of July, 1946

[Signed] DONA RICHARDS
Notary Public [142]

EXHIBIT D

In the Superior Court of the State of California,
in and for the County of San Diego.

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian Ad Litem, Plaintiffs, vs. George White, et al., Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and appearing for himself only and by way of answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

I.

Answering Paragraph IV of plaintiffs' complaint this defendant has not knowledge, information or belief sufficient to enable him to answer the allegations in Paragraph IV contained and basing his answer on that ground denies generally and specifically, each and every, all and singular, the allegations in said Paragraph IV, except

that this defendant denies specifically that at said time and place, or elsewhere, or at all, this answering defendant negligently drove and operated, or negligently drove or operated, a certain automobile upon and along, or upon or [143] along, the said public highway, thereby causing the same to and did, or thereby causing the same to or did, then and there, or then or there, as a result thereof, or otherwise, collide with and run into, or collide with or run into, the said said Claude McLester Lee. Denies that as a direct and proximate result of the foregoing and the aforesaid negligence of the defendant George White, or that as a direct or proximate result of the foregoing or the aforesaid negligence, or any negligence whatsoever of the defendant George White, the said Claude McLester Lee sustained injuries which directly and proximately caused and resulted in his death on the said day, or that the said Claude McLester Lee sustained injuries which directly or proximately caused or resulted in his death on the said day, or at any other time, or at all.

II.

Answering Paragraph V of plaintiffs' complaint said defendant does not have sufficient knowledge, information or belief to enable him to answer and basing his answer upon that ground denies each and every and all and singular the allegations contained in said paragraph.

III.

Answering the allegations in Paragraph VI this answering defendant denies that by reason of any acts whatsoever of this answering defendant in the particulars in plaintiffs' complaint set out, or otherwise, or at all, the plaintiffs have been deprived of the services, support,

society, comfort, protection, guidance and education, or that the plaintiffs have been deprived of the services or support or society or comfort or protection or guidance or education, of or by their said father to their great loss and damage, or to their great loss or damage, or otherwise, or at all, of the said plaintiffs in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum whatsoever. [144] Denies that said damages, or any other damages whatsoever, have been sustained and suffered, or sustained or suffered, by them as a direct and proximate result, or direct or proximate result, of any acts whatsoever of this answering defendant.

Further Answering Plaintiffs' Said Complaint and for a Separate and First Special Defense Thereto, This Answering Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and
HAROLD L. WATT

By

Attorneys for Defendant George White

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf.
Exhibit. Date 1/21/47. No. 13 in Evidence—3 pages—
D-1, D-2, D-3. Clerk, U. S. District Court, Sou. Dist.
of Calif. Cross, Deputy Clerk. [145]

EXHIBIT E

In the Superior Court of the State of California
in and for the County of San Diego

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by
Mildred E. Taylor, their Guardian Ad Litem, Plaintiffs,
vs. George White, et al., Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering the complaint on file herein for himself and not on behalf of his co-defendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs II, V and VI of the complaint on file herein and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs, except that this defendant admits that Claude McLester Lee was at the time of his death an adult over the age of twenty-one (21) years.

II.

Answering paragraph III of the complaint on file herein this defendant alleges that the automobile mentioned in said paragraph was at the time of said accident owned by the [146] Northlumberland Mining Company, a corporation, and at the time and place of the accident described in the complaint this defendant was driving said automobile by and with the consent of said corporation.

III.

This defendant denies generally and specifically each and all of the allegations in paragraph IV of the complaint on file herein, except this defendant admits that the automobile described in said paragraph, and while being driven by this defendant, did at or about the time and place described in said paragraph collide with Claude McLester Lee and that as a result of said collision said Claude McLester Lee sustained injuries which directly and proximately resulted in his death.

IV.

This defendant denies that the plaintiffs, or either of them, have been damaged in any sum whatsoever.

And for a Further, Separate and Second Defense,
This Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, this defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and
HAROLD L. WATT

By [Signed] Thomas P. Menzies
Attorneys for Defendant George White [147]

State of California

County of San Diego.—ss

George White, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

[Signed] GEORGE WHITE

Subscribed and sworn to before me this 23rd day of August, 1946.

[Signed] GAYLE H. DAVIS

Notary Public in and for said County and State [148]

EXHIBIT F

In the Superior Court of the State of California,
in and for the County of San Diego.

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their Guardian ad Litem, Plaintiffs, vs. George White, John Doe and Doe Corporation, a corporation, Defendants.

COMPLAINT FOR WRONGFUL DEATH

Come now the plaintiffs above-named and for cause of action against the defendants above-named allege:

I.

That Michael Lee is a minor of the age of nine years and that Patricia Lee is a minor of the age of eleven

years; that by an order of the above entitled court duly made and entered on the 6th day of August, 1946, Mildred E. Taylor was duly appointed guardian ad litem of the said minors in the above entitled cause; that such order has not been revoked and is in full force and effect, and that by virtue thereof said Mildred E. Taylor is now the duly appointed, qualified and acting guardian ad litem of the said minors.

II.

That the plaintiffs are ignorant of the true names of the defendants John Doe and Doe Corporation, a corporation, and for [149] that reason the said defendants are sued herein under the said names as fictitious names, and plaintiffs pray that when the true names of these defendants are ascertained, they may be inserted herein and in all subsequent proceedings in this action and that the said action may then proceed against them under their true names.

III.

That at all times herein mentioned the defendants, John Doe and Doe Corporation, a corporation, were the owners of the automobile hereinafter mentioned and that at all times herein mentioned George White was driving the said automobile by and with the consent and permission of the said defendants, John Doe and Doe Corporation, a corporation.

IV.

That on or about the 20th day of July, 1946, at or about the hour of 10:30 o'clock P. M. on said day, Claude McLester Lee was walking upon and along a certain public highway known as United States Highway No. 101

in the County of San Diego, State of California, at or about a point on said highway near the town of Ocean-side in said County; that at said time and place the defendant, George White, negligently drove and operated a certain automobile upon and along the said public highway, thereby causing the same to, and it did then and there as a result thereof, collide with and run into the said Claude McLester Lee; that as a direct and proximate result of the foregoing and the aforesaid negligence of the defendant, George White, the said Claude McLester Lee sustained injuries which directly and proximately caused and resulted in his death on the said day.

V.

That the said Claude McLester Lee was an adult over the age of twenty-one years at the time of his said death; that plaintiffs, Michael Lee and Patricia Lee, are the surviving son and [150] daughter of the said Claude McLester Lee; that said Claude McLester Lee left surviving him at the time of his death his said minor children and his wife, Leona Ann Osborne Lee; that the said wife, Leona Ann Osborne Lee, died in the County of San Diego on July 21, 1946; that said Leona Ann Osborne did not during her lifetime file or initiate any action against the defendants herein for damages for the aforesaid death of said Claude McLester Lee; that the plaintiffs herein are the sole and only heirs at law of Claude McLester Lee, deceased.

VI.

That by reason of the aforesaid death of the said Claude McLester Lee, the plaintiffs have been deprived of the services, support, society, comfort, protection, guidance and education of and by their said father to the

great loss and damage of the said plaintiffs in the sum of \$50,000, which damages have been sustained and suffered by them, all as a direct and proximate result of the aforesaid negligence of the defendant, George White.

Wherefore, plaintiffs pray judgment against the defendants and each thereof in the sum of \$50,000, together with costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

WILLIAM GUTHRIE
JOHN B. LONERGAN and
DONALD W. JORDAN

Attorneys for Plaintiffs
By [Signed] John B. Lonergan [151]

State of California,
County of San Bernardino.—ss.

Mildred E. Taylor, being first duly sworn, deposes and says:

That she is the duly appointed, qualified and acting guardian ad litem herein of the plaintiffs; that she makes this verification for and on their behalf; that she has read the foregoing complaint and knows the contents thereof and the same is true of her own knowledge.

[Signed] MILDRED E. TAYLOR

Subscribed and sworn to before me this day of August, 1946.

[Notarial Seal]

[Signed] ORA R. WILLEFORD
Notary Public in and for said County and State. [152]

EXHIBIT G
Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)
August 15 1946.

Mr. George White,
Beverly-Wilshire Hotel,
Room 449,
9514 Wilshire Boulevard,
Beverly Hills, California.

Dear Mr. White:

Please find enclosed herewith two original answers, one in Action No. 134630, entitled Fitzgerald vs. White, the other in Action 134918, entitled Lee vs. White, both of which are now pending in the Superior Court of this state, in and for the County of San Diego.

You will note that both of these answers are prepared in accordance with the sworn statement that you gave to me as attorney for the carrier of the Lincoln Zephyr Sedan owned by the Northumberland Mining Company.

Please read these answers over carefully and make sure that you understand the full import of their contents. If there is any doubt in your mind as to any of the statements that are contained in these answers you may get in touch with me, or if you choose to submit them to your

own attorney before signing them you may do so. Both of these answers will have to be subscribed and sworn to by you before a Notary Public or other officer authorized to administer an oath in this state.

I have secured an extension of time in Action No. 134918 in which to file your answer. This time will expire on Monday, August 26th. The time for answer in Action No. 134630 expires on August 22, 1946.

Will you therefore please have both of these answers returned to my office not later than 10:00 o'clock A. M., August 21st.

No doubt you will recall that on July 31st you informed Mr. Clifton and the writer that you would be able to furnish us with the name and address of a young lady who had seen the damage to the left [153] fender of the Lincoln Zephyr Sedan that you borrowed from the Northumberland Mining Company. Would you please be good enough to furnish me by return mail

[end of page 1 of letter]

2.

Mr. Menzies to Mr. White August 15 1946.
with that young lady's name and address in order that
we may secure a statement from her.

Thanking you for your prompt attention to this matter,

Yours truly,

[Signed] THOMAS P. MENZIES

TPM-K

Enclosures [154]

EXHIBIT H

Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)
August 19 1946

Mr. John T. Holt,
Attorney at Law,
San Diego Trust & Savings Building,
San Diego, California.

In Re: Fitzgerald vs. White
Action No. 134630.
Lee vs. White
Action No. 134918.

Dear Mr. Holt:

Confirming our long distance telephone conversation of even date in regard to the above captioned matters, please find enclosed herewith a copy of the complaint in each case.

In the first numbered case, as you know, we filed a motion for change of venue from San Diego County to Los Angeles County, which motion was heard on the 12th of August and denied. Our demurrer was overruled and we were given until the 22nd in which to file our answer.

In the second action (Lee vs. White) we secured an extension of time from the attorneys for the plaintiffs and the answer in that case is due on August 26th.

I am also enclosing herewith a substitution of attorneys and I would suggest that you secure an extension of time in each of these cases in order to permit Mr.

White to turn the defense of both of these actions over to the Automobile Club of Southern California and the Standard Accident Company of Detroit.

As you know, I delivered to Mr. White answers in both of these cases which were prepared in accordance with his sworn statement given to us immediately after the accident when all of the facts were fresh in his mind. For your information this statement was repeated to us on two different occasions and there was no material change in [155] its repetition. In view of Mr. White's inconsistent statements in connection with this matter and as you say he told the Automobile Club the truth in regard to the facts and circumstances surrounding

[end of page 1 of letter]

2.

Mr. Menzies to Mr. Holt. August 19 1946.

In Re: Fitzgerald vs. White—No. 134630

Lee vs. White —No. 134918.

the accident, in my opinion, he should have no difficulty in convincing them that they should take over and defend these two cases.

For your information I am returning to Mr. White both his Inter-Insurance Exchange Policy of the Automobile Club and the Standard Accident Policy and am enclosing herewith a copy of the letter of transmittal which I am this day forwarding to Mr. White.

With kindest personal regards,

Yours truly,

[Signed] THOMAS P. MENZIES

TPM—K

Enclosures

CC—Mr. White [156]

EXHIBIT I

Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles

[Via Air Mail]

August 19 1946.

Mr. George White,
Grant Hotel,
San Diego, California.

Dear Sir:

I was today advised by your attorney, Mr. John T. Holt of San Diego, that it was not your wish to execute the answers which we had prepared based on your previous statements to the Company.

Copy of a letter which I am today addressing to Mr. Holt is enclosed herewith and which further sets out the position of The Home Indemnity Company in view of this development.

We return herewith Standard Accident Insurance Company Policy No. J 427867 and Inter-Insurance Exchange of the Automobile Club of Southern California Policy

No. 447540, both issued in your favor which you left at the office the other day.

As indicated in the letter to Mr. Holt we have consented to a substitution of attorneys in both cases in order that you may be represented by someone who will conduct the defense in accordance with your views.

For your further information you will note in the letter to Mr. Holt the date upon which appearances are due in both of the cases—one being due on the 22nd of this month and the other on the 26th. It is therefore imperative that you give this matter your immediate attention.

Very truly yours,

[Signed] THOMAS P. MENZIES

TPM—K

Enclosures

Registered—Return

Receipt Requested

CC—Mr. Holt [157]

EXHIBIT J

JOHN T. HOLT

Attorney at Law

Suite 1114 San Diego Trust & Savings Building

San Diego, California

Phone Main 8008

August 23rd, 1946.

Thomas P. Menzies,

Attorney at Law,

1014 Fidelity Building,

548 South Spring Street,

Los Angeles 13, California.

Dear Mr. Menzies:

Please find enclosed truthful answers verified by George White in the Fitzgerald vs George White case and Michael Lee et al., vs George White case. Mr. White has always cooperated and has been willing to do so. As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections. You at all times have refused to do so. As you remember, he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then. If you will remember several days after this and a very short time after the accident itself, you and I talked by telephone and I asked

you to remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge. I merely wish to refresh your recollection about this matter, because I have offered myself as a witness in this regard.

Mr. White makes demand upon you to defend the above referred to cases. It is our understanding that it is the duty of your Company to defend Mr. White and the other defendant in the cases, and Mr. White expects you to do so.

Very truly yours,

[Signed] JOHN T. HOLT

JTH:hs

encls [158]

Case No. vs. Plf. Exhibit. Date 1/20/47. No. 8 in Evidence. Letter 8/23/46 and answer No. 18 on p. 4 of Answer to Plf. for Adm. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

Received copy of the within Request for Admissions this 23 day of December, 1946. Thomas P. Menzies and Harold L. Watt, by Thomas P. Menzies, Attorneys for Defendant, Home Indemnity Company of New York.

[Endorsed]: Filed Dec. 23, 1946. [159]

[Title of District Court and Cause]

ANSWER OF HOME INDEMNITY COMPANY
OF NEW YORK TO REQUEST OF PLAINTIFF FOR ADMISSIONS

To the Plaintiff, Standard Accident Insurance Company of Detroit, a Corporation, and

To Messrs. Nourse & Jones, Its Attorneys:

Comes now defendant Home Indemnity Company of New York, a corporation, and in answer to request for admissions heretofore served and filed by plaintiff, Standard Accident Insurance Company of Detroit, a corporation, makes answer as follows:

1. To Request No. 1, admits that Exhibit "A" attached to said request is a full, true and correct copy of the answer referred to in said request.
2. To Request No. 2, admits that said defendant George White refused to verify said answer referred to in [160] said interrogatory, but alleges that he did not designate the specific grounds upon which he based said refusal.
3. To Request No. 3, admits that the instrument marked Exhibit "B" is a full, true and correct copy of the answer referred to in said interrogatory.
4. To Request No. 4, this defendant states that the answer of which said Exhibit "B" is a copy, was delivered, presumably on behalf of said George White, to Thomas P. Menzies, Esq., an attorney employed by defendant Home Indemnity Company of New York to defend said action.

5. To Request No. 5, this defendant states that said Thomas P. Menzies, Esq., did cause said answer, of which Exhibit "B" is a copy, to be filed in the action in which it is entitled.

6. To Request No. 6, admits that the instrument marked Exhibit "C" is a full, true and correct copy of the complaint referred to in said request.

7. To Request No. 7, this defendant admits that the instrument referred to therein, marked Exhibit "B", is a full, true and correct copy (with the exception of the jurat) of the answer therein referred to.

8. To Request No. 8, admits that said George White refused to answer said interrogatory, but alleges that he did not designate the specific grounds upon which he based said refusal.

9. To Request No. 9, admits that the instrument referred to in said interrogatory and answer as Exhibit "E", is a full, true and correct copy of the answer therein referred to. [161]

10. To Request No. 10, admits that said answer, of which Exhibit "E" is a copy, was delivered on behalf of defendant George White to Thomas P. Menzies, an attorney employed by defendant Home Indemnity Company of New York, to defend said action.

Case No. Plf. Exhibit. No. 6 in Evidence.
Ans. 5, 8, 9 and 10. Clerk, U. S. District Court, Sou.
Dist. of Calif., Deputy Clerk.

11. To Request No. 11, admits that Thomas P. Menzies caused said answer, of which Exhibit "E" is a copy, to be filed in the action in which it is entitled.

12. To Request No. 12, admits that the instrument annexed thereto, marked Exhibit "F", is a full, true and correct copy of the complaint referred to in said interrogatory.

13. To Request No. 13, admits the facts in said request set out.

14. To Request No. 14, defendant states that at the time of requesting defendant George White to verify the answers, of which Exhibits "A" and "B" are copies, the defendant Home Indemnity Company of New York, through its attorney, Thomas P. Menzies, Esq., knew that the plea of guilty referred to in Request No. 13, had been entered by defendant George White.

15. To Request No. 15, admits that the letter annexed thereto, marked Exhibit "G", is a full, true and correct copy of a letter written by Thomas P. Menzies to defendant George White on August 15, 1946.

16. To Request No. 16, admits that the copy of the letter annexed thereto, marked Exhibit "H", is a full, true and correct copy of a letter written by Thomas P. Menzies to John T. Holt under date of August 19, 1946.

17. To Request No. 17, admits that the copy of a letter annexed thereto, marked Exhibit "I", is a full, true [162] and correct copy of a letter written by Thomas P. Menzies to defendant George White under date of August 19, 1946.

18. To Request No. 18, admits that the copy of a letter annexed thereto, marked Exhibit "J", is a full, true

and correct copy of a letter dated August 23, 1946, written by John T. Holt to Thomas P. Menzies. [Written in margin]: part of ex. 8.

19. To Request No. 19, this defendant states that a reply was made to the letter of John T. Holt annexed thereto, marked Exhibit "J", and that reply thereto by Thomas P. Menzies on behalf of defendant Home Indemnity Company of New York, dated August 26, 1946, is annexed hereto, marked Exhibit "A".

20. To Request No. 20, admits that at all times from July 20, 1946, to and including August 23, 1946, Thomas P. Menzies was acting as attorney for this defendant.

Case No. 5729 O'C, Civ. Plf. Exhibit. Date 1/20/47.
No. 5 in Evidence. Ans. No. 20. Clerk, U. S. District
Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

21. To Request No. 21, admits that in writing the letters, copies of which are annexed thereto and marked Exhibits "G", "H" and "I", Thomas P. Menzies was acting in behalf of this defendant.

22. To Request No. 22, this defendant states that it does not know and cannot truthfully state whether or not John T. Holt was, on the 23rd day of August, 1946, attorney for defendant George White, and does not know and cannot truthfully state whether as such attorney, or on behalf of George White, wrote the letter marked Exhibit "J" referred to in said Request No. 22, and this defendant states in this connection that on August 20, 1946, and again on August 27, 1946, its attorney, Thomas P. Menzies, received a telegram from John T. Holt, stating in part, "I do not and will [163] not represent Mr. White in the civil cases," and "This

is to put you on notice that I am not representing Mr. White in the civil cases."

23. To Request No. 23, this defendant denies that the statement in the letter, a copy of which is annexed thereto, marked Exhibit "J", "As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections," is a true statement of the alleged facts related therein. Denies that George White demanded on numerous occasions, or on any occasions, that he be presented with the first statement taken from him for the purpose of making corrections, or any other purpose, or at all.

24. To Request No. 24, denies that the statement in the letter (said Exhibit "J") that "he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then," is a true statement of the statements made to this defendant, or its attorney, by George White and/or of the time of the making of said statements. Denies that defendant George White told this defendant within twelve hours after the first statement that he remembered falling asleep and having awakened while driving the car and that the accident could have happened then.

25. To Request No. 25, defendant admits that on or about July 29, 1946, said John T. Holt, in a telephone conversation with Thomas P. Menzies, attorney for de-

fendant Home Indemnity Company, made the statements referred to in said request; that none of this defendant's [164] agents, servants or employees were present at any conversation between John T. Holt and the defendant George White, and this defendant has no knowledge as to what, if anything, transpired between George White and John T. Holt.

Case No. 5729 O'C. Plf. Exhibit. Date 1/20/47. No. 10 in Evidence. Ans. 25. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

26. To Request No. 26, this defendant admits the statements in said request contained.

Case No. 5729 O'C. Plf. Exhibit. Date 1/20/47. No. 11 in Evidence. Ans. 26. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

Dated this 2nd day of January, 1947.

THE HOME INDEMNITY COMPANY OF
NEW YORK, a Corporation,

By L. E. Clifton

Claims Manager for Southern California

THOMAS P. MENZIES and
HAROLD L. WATT

By Thomas P. Menzies

Attorneys for Defendant The Home Indemnity
Company of New York, a Corporation [165]

[Verified] [166]

EXHIBIT "A"

Law Offices
THOMAS P. MENZIES
548 South Spring Street
Los Angeles

Mr. John T. Holt,
Attorney at Law,
Suite 1114 San Diego Trust & Savings Building,
San Diego 1, California.

Dear Mr. Holt:

This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

I am now returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

Case No. Plf. Exhibit. Date 1/20/47. No. 9 in Evidence. Letter this par. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases.

Very truly yours,
(Signed) THOMAS P. MENZIES

TPM—K

Enclosures [167]

[Affidavit of Service by Mail]

[Endorsed]: Filed Jan. 3, 1947. [169]

[Title of District Court and Cause]

AMENDMENT TO COMPLAINT

Comes now plaintiff, Standard Accident Insurance Company of Detroit, a corporation, and, by leave of court first had, by way of amendment to its complaint on file herein and particularly to the allegations of paragraph XVII of said complaint, does allege:

XVII.

That out of and by reason of the facts, contracts and transactions hereinbefore alleged and described, an actual controversy has arisen by and between plaintiff and defendant, Home Indemnity Company of New York, the plaintiff and defendant George White, and defendants Home Indemnity Company of New York and George White, as to the rights and duties of the plaintiff and defendant, Home Indemnity Company of New York, concerning their respective obligations to defend, on behalf [170] of defendant George White, said action No. 134918 and said action No. 134630, and in regard to the respective liabilities of the plaintiff and defendant, Home Indemnity Company of New York, to pay any judgments that may be rendered in said actions, or either of them, against the defendant George White.

That this plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that the defendant, Home Indemnity Company of New York, contends that defendant George White, in reporting to it the accident hereinbefore described, denied that the Lincoln Zephyr automobile driven by him as aforesaid had collided with said Claude McLester Lee or said Leana Mae Osborne Lee, but that he thereafter admitted that said automobile had struck said persons and refused to verify answers to the complaints in said actions No.

134918 and No. 134630 submitted to him by the said counsel employed by Home Indemnity Company of New York, as aforesaid, and by which said answers said defendant, George White, would under oath have denied that the automobile driven by him collided with said persons; and that said Home Indemnity Company of New York contends that by reason of the facts last herein-before alleged said George White breached the conditions of the policy of insurance issued by it, as aforesaid, and that by reason of such breach it has been excused from the performance as to George White of its obligations under its policy of insurance issued by it as aforesaid, and is not obligated to defend said actions, or either of them, or to pay any judgment or judgments that may be rendered in said actions against said George White; that said Home Indemnity Company of New York further contends that if its policy is in force and effect and it is obligated thereunder to the defendant George White, that its policy and the policy issued by this plaintiff, as aforesaid, constitute concurrent insurance, and that it and this plaintiff are equally [171] obligated to pay the expense of the defense of said actions against said George White, and are each obligated to pay that portion of any judgments rendered in said actions No. 134918 and No. 134630 against said George White which the amount of the policy issued by them, respectively, bears to the total amount of the effective insurance under said policies.

That plaintiff is informed and believes, and upon such information and belief alleges, that the defendant, George White, contends that he has fully complied with all of the terms and conditions of said policy of insurance issued by defendant, Home Indemnity Company of New York, as aforesaid, and has not breached any of the terms or conditions thereof, and that said policy constitutes pri-

mary insurance against the claims of the plaintiffs in said actions No. 134918 and No. 134630, and that the defendant, Home Indemnity Company of New York, is obligated to defend said actions on his behalf and pay any judgments rendered against him therein up to but not exceeding the limits of liability set forth in said policy; but further contends that if he did breach said policy, said breach was unsubstantial and did not in anywise prejudice the defendant, Home Indemnity Company of New York, and further contends that if he did breach said policy and that by reason of said breach Home Indemnity Company of New York had been so excused from its obligations to him under said policy, that then this plaintiff is obligated to defend said actions on his behalf and to pay any judgments rendered against him in said actions No. 134918 and No. 134630, not exceeding the limits of liability of the policy issued by this plaintiff.

That this plaintiff contends that the policy issued by Home Indemnity Company of New York is in full force and effect and is primary coverage, and that said defendant, Home Indemnity Company of New York, is obligated to undertake and at its own expense [172] pay for the investigation of the accident hereinbefore described and the defense of the said actions against George White, and pay any judgments that may be rendered against George White until its limits of liability hereinbefore described have been exhausted, and that the policy of this plaintiff constitutes excess insurance only, and that this plaintiff is not obligated to defend said actions or to pay any judgments that may be rendered therein, except so much of said judgments as may be in excess of the limits of liability of the policy issued by defendant Home Indemnity Company of New York. This plaintiff further

contends that if defendant, George White, did after the occurrence of the accident hereinbefore described breach the terms of the policy issued by the defendant, Home Indemnity Company of New York, as aforesaid, on his part to be performed, and did thereby release and excuse Home Indemnity Company of New York from its obligations under said policy, that then defendant, George White, is obligated to pay the expense of the defense of said actions and to pay any judgments rendered against him therein up to, but not beyond, the amount which, except for said breach of said policy, Home Indemnity Company of New York would have been obligated to pay, and that this plaintiff is not obligated to defend said actions or to pay any portion of said judgments, except so much thereof (not exceeding the limits of the policy issued by it) as shall be in excess of \$100,000.00 as to any one of the plaintiffs, and \$300,000.00 for all of the plaintiffs in said actions No. 134918 and No. 134630.

This plaintiff further contends that if George White failed to cooperate with the defendant, Home Indemnity Company of New York, and did thereby breach the terms and conditions of the policy issued by defendant, Home Indemnity Company of New York, he likewise failed to cooperate with this plaintiff under and [173] in accordance with the terms of its policy, and that this plaintiff has, by reason of such failure of cooperation, been released from obligation under its policy.

NOURSE & JONES,

By Paul Nourse,

Attorneys for Plaintiff. [174]

Received copy of the within Amendment to Complaint this 20th day of January, 1947., Attorneys for Home Indemnity Company of New York.

[Endorsed]: Filed Jan. 20, 1947. [175]

[PLAINTIFF'S EXHIBIT NO. 1]

In the Superior Court of the State of California
in and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his
Guardian ad litem, James Richard Osborne, and James
Richard Osborne, Plaintiffs, vs. George White and North
Lumberland Mining Company, Defendants.

COMPLAINT

FIRST CAUSE OF ACTION

Plaintiff James Carl Fitzgerald complains and alleges:

I.

That plaintiff James Richard Osborne is the grandfather of plaintiff James Carl Fitzgerald; that said last mentioned plaintiff is a minor of the present age of eighteen months; that plaintiff James Richard Osborne is the duly appointed and acting guardian ad litem of said minor plaintiff herein.

II.

That at all times herein mentioned, defendant North Lumberland Mining Company was the owner of a certain Lincoln Zephyr automobile driven, steered, operated and caused to be propelled with the full knowledge, consent and permission of said defendant company by defendant George White, and that the said defendant George White was at all times herein mentioned the servant, agent and employee of the said defendant company acting within the scope of his agency and authority as such servant, agent and employee.

III.

That on July 20, 1946, in the County of San Diego, State of California, on U. S. Highway No. 101, a public highway, at and near [176] Solano Beach, defendant George White did carelessly, recklessly and negligently drive, steer, operate and cause to be propelled the said automobile into, upon and against one Leana Mae Osborne Lee, the mother of plaintiff James Carl Fitzgerald as a proximate result of which carelessness, recklessness and negligency the said Leana Mae Osborne Lee was caused to and did suffer her death.

IV.

The said minor plaintiff James Carl Fitzgerald is the sole heir at law of the said Leana Mae Osborne Lee.

V.

That by reason of the foregoing said minor plaintiff has been deprived of the society, services, comfort, support, *muture*, counsel guidance, protection and ability in training, educating and rearing him, to his great loss and damage in the sum of Fifty Thousand Dollars (\$50,000.00).

SECOND CAUSE OF ACTION

I.

Plaintiff hereby refers to and adopts as part of this, the second cause of action, each and all of the allegations in paragraphs II and III of the first cause of action herein.

II.

That plaintiff James Richard Osborne is the father of the said Leana Mae Osborne Lee, deceased; that the said Leana Mae Osborne Lee was at all times herein mentioned a minor of the age of 18 years; that by reason of the foregoing, this plaintiff has been obliged to incur and he has incurred liability and expense for the preparation of the body of the said Leana Mae Osborne Lee for burial and for her funeral and burial in an amount which said plaintiff is informed and believes and therefore alleges to be in the sum of Five Hundred Dollars (\$500.00) the reasonable value thereof.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, as follows: [177]

1. In favor of plaintiff James Carl Fitzgerald in the sum of Fifty Thousand Dollars (\$50,000.00) by virtue of the first cause of action herein, and
2. In favor of the plaintiff James Richard Osborne in the sum of Five Hundred Dollars (\$500.00) by virtue of the second cause of action herein, and
3. In favor of plaintiffs for their costs herein incurred and expended, and
4. For such other and further relief as to the court seems just and proper in the premises.

EDGAR B. HERVEY (Signed)

Attorneys for Plaintiffs [178]

State of California
County of San Diego—ss

Edgar B. Hervey, being first duly sworn, deposes and says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in San Diego, San Diego County, California, and is the attorney for the plaintiffs in the above entitled action; that plaintiff James Richard Osborne is unable to make the verification because he is absent from said county, and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

EDGAR B. HERVEY (Signed)

Subscribed and sworn to before me this 22nd day of July, 1946.

DONA RICHARDS (Signed)
Notary Public [179]

Case No. 5729 O'C Civ. Std. Accid. vs. Home Indemnity. Plf. Exhibit. Date 1/20/47. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [180]

[PLAINTIFF'S EXHIBIT NO. 2]

In the Superior Court of the State of California
In and for the County of San Diego

No. 134630

James Carl Fitzgerald, a minor, by and through his
Guardian at Litem, James Richard Osborne, and James
Richard Osborne, Plaintiffs, vs. George White, and North
Lumberland Mining Company, Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant, George White, and answering the complaint on file herein for himself and not on behalf of his co-defendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs I, IV and V of the first alleged cause of action and paragraph II of the second alleged cause of action of the complaint on file herein, and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs and the whole thereof.

II.

Denies that the plaintiff, James Carl Fitzgerald has been damaged in the sum of Fifty Thousand Dollars

(\$50,000.00), or in [181] any sum, or at all; denies that the plaintiff James Richard Osborne has been damaged in the sum of Five Hundred Dollars (\$500.00), or in any other sum, or at all.

III.

Answering paragraph II of the first alleged cause of action set forth in the complaint on file herein, this defendant denies generally and specifically each and all of the allegations of said paragraph, except his defendant admits that the Lincoln Zephyr automobile described in said paragraph was at the time of the accident described in the complaint, owned by the defendant, North Lumberland Mining Company, and this defendant was at the time and place of the accident driving said automobile with the full knowledge and consent of said North Lumberland Mining Company.

IV.

Answering paragraph III of the first alleged cause of action of the complaint on file herein this defendant denies generally and specifically each and all of the allegations of said paragraph, except that this defendant admits that the automobile driven by him did at or about the time and place described in the complaint, collide with Leane Mae Osborne Lee and that as a result of said collision Leana Mae Osborne Lee died, and except that this defendant has not information and belief sufficient to enable him to answer the allegations of said paragraph that said Leana

Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald, and for want of such information and belief and basing his denial on that ground denies that Leana Mae Osborne Lee was the mother of the plaintiff, James Carl Fitzgerald.

And for a Further and Separate Defense to Each of the First and Second Causes of Action Set Forth in the Complaint on File Herein This Defendant Alleges: [182]

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for her own safety.

Wherefore, defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS F. MENZIES and
HAROLD L. WATT,

By.....

Attorney for Defendant, George White.

Case No. 5729 O'C Civ. Std. Accid. vs. Home Indemnity. Plf. Exhibit. Date 1/20/47. No. 2 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [183]

[PLAINTIFF'S EXHIBIT NO. 3]

In the Superior Court of the State of California,
in and for the County of San Diego.

No.....

Michael Lee, a minor, and Patricia Lee, a minor, by
Mildred E. Taylor, their Guardian ad Litem, Plaintiffs,
vs. George White, John Doe and Doe Corporation, a
corporation, Defendants.

COMPLAINT FOR WRONGFUL DEATH

Come now the plaintiffs above-named and for cause of
action against the defendants above-named allege:

I.

That Michael Lee is a minor of the age of nine years
and that Patricia Lee is a minor of the age of eleven
years; that by an order of the above entitled court duly
made and entered on the 6th day of August, 1946, Mildred
E. Taylor was duly appointed guardian ad litem of the
said minors in the above entitled cause; that such order
has not been revoked and is in full force and effect, and
that by virtue thereof said Mildred E. Taylor is now the
duly appointed, qualified and acting guardian ad litem
of the said minors.

II.

That the plaintiffs are ignorant of the true names of
the defendants John Doe and Doe Corporation, a corpora-
tion, and for [184] that reason the said defendants are
sued herein under the said names as fictitious names, and
plaintiffs pray that when the true names of these de-
fendants are ascertained, they may be inserted herein and

in all subsequent proceedings in this action and that the said action may then proceed against them under their true names.

III.

That at all times herein mentioned the defendants, John Doe and Doe Corporation, a corporation, were the owners of the automobile hereinafter mentioned and that at all times herein mentioned George White was driving the said automobile by and with the consent and permission of the said defendants, John Doe and Doe Corporation, a corporation.

IV.

That on or about the 20th day of July, 1946, at or about the hour of 10:30 o'clock P. M. on said day, Claude McLester Lee was walking upon and along a certain public highway known as United States Highway No. 101 in the County of San Diego, State of California, at or about a point on said highway near the town of Oceanside in said County; that at said time and place the defendant, George White, negligently drove and operated a certain automobile upon and along the said public highway, thereby causing the same to, and it did then and there as a result thereof, collide with and run into the said Claude McLester Lee; that as a direct and proximate result of the foregoing and the aforesaid negligence of the defendant, George White, the said Claude McLester Lee sustained injuries which directly and proximately caused and resulted in his death on the said day.

V.

That the said Claude McLester Lee was an adult over the age of twenty-one years at the time of his said death;

that plaintiffs, Michael Lee and Patricia Lee, are the surviving son and [185] daughter of the said Claude McLester Lee; that said Claude McLester Lee left surviving him at the time of his death his said minor children and his wife, Leona Ann Osborne Lee; that the said wife, Leona Ann Osborne Lee, died in the County of San Diego on July 21, 1946; that said Leona Ann Osborne Lee did not during her lifetime file or initiate any action against the defendants herein for damages for the aforesaid death of said Claude McLester Lee; that the plaintiffs herein are the sole and only heirs at law of Claude McLester Lee, deceased.

VI.

That by reason of the aforesaid death of the said Claude McLester Lee, the plaintiffs have been deprived of the services, support, society, comfort, protection, guidance and education of and by their said father to the great loss and damage of the said plaintiffs in the sum of \$50,000, which damages have been sustained and suffered by them, all as a direct and proximate result of the aforesaid negligence of the defendant, George White.

Wherefore, plaintiffs pray judgment against the defendants and each thereof in the sum of \$50,000, together with costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

WILLIAM GUTHRIE,
JOHN B. LONERGAN and
DONALD W. JORDAN,

Attorneys for Plaintiffs.

By John B. Lonergan. [186]

State of California,
County of San Bernardino—ss.

Mildred E. Taylor, being first duly sworn, deposes and says:

That she is the duly appointed, qualified and acting guardian ad litem herein of the plaintiffs; that she makes this verification for and on their behalf; that she has read the foregoing complaint and knows the contents thereof and the same is true of her own knowledge.

MILDRED E. TAYLOR

Subscribed and sworn to before me this.....day of August, 1946.

(Notarial Seal) ORA R. WILLEFORD,
Notary Public in and for said County and State

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf.
Exhibit. Date 1/20/47. No. 3 in Evidence. Clerk, U. S.
District Court, Sou. Dist of Calif. Cross, Deputy
Clerk. [187]

[PLAINTIFF'S EXHIBIT NO. 4]

In the Superior Court of the State of California

In and for the County of San Diego

No. 134918

Michael Lee, a minor, and Patricia Lee, a minor, by
Mildred E. Taylor, their Guardian Ad Litem, Plaintiffs,
vs. George White, et al., Defendants.

ANSWER OF DEFENDANT GEORGE WHITE

Comes now the defendant George White and answering the complaint on file herein for himself and not on behalf of his co-defendant, admits, denies and alleges as follows, to-wit:

I.

Alleges that this defendant has not information or belief sufficient to enable him to answer the allegations of paragraphs II, V and VI of the complaint on file herein and for want of such information and belief and basing his denial on that ground denies each and all of the allegations of said paragraphs, except that this defendant admits that Claude McLester Lee was at the time of his death an adult over the age of twenty-one (21) years.

II.

Answering paragraph III of the complaint on file herein this defendant alleges that the automobile mentioned in said paragraph was at the time of said accident owned by the [188] Northlumberland Mining Company, a corporation, and at the time and place of the accident described in the complaint this defendant was driving said automobile by and with the consent of said corporation.

III.

This defendant denies generally and specifically each and all of the allegations in paragraph IV of the complaint on file herein, except this defendant admits that the automobile described in said paragraph, and while being driven by this defendant, did at or about the time and place described in said paragraph collide with Claude McLester Lee and that as a result of said collision said Claude McLester Lee sustained injuries which directly and proximately resulted in his death.

IV.

This defendant denies that the plaintiffs, or either of them, have been damaged in any sum whatsoever.

And for a Further, Separate and Second Defense, This Defendant Alleges:

I.

That if the plaintiffs sustained damages in the particulars in their complaint set out, or otherwise, that the same occurred proximately and directly through and by reason of the negligence of the decedent in failing to exercise due or any care or caution for his own safety.

Wherefore, this defendant prays that the plaintiffs take nothing by their said action and that this defendant have and recover his costs of suit herein expended.

THOMAS P. MENZIES and
HAROLD L. WATT

By.....

Attorneys for Defendant George White

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf.
Exhibit. Date 1/20/47. No. 4 in Evidence. Clerk, U. S.
District Court, Sou. Dist. of Calif. Cross, Deputy
Clerk. [189]

[PLAINTIFF'S EXHIBIT NO. 14]

Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)
August 26 1946.

Mr. John T. Holt,
Attorney at Law,
Suite 1114 San Diego Trust & Savings Building,
San Diego 1, California.

Dear Mr. Holt:

This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases.

Very truly yours,

Thomas P. Menzies

TPM—K

Enclosures [190]

Case No. 5729 O'C. Std. Accident vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 14 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [191]

[PLAINTIFF'S EXHIBIT NO. 15]

[WESTERN UNION TELEGRAM]

* * * * *

Charge to the account of John T. Holt \$.....

DAY LETTER August 27th, 1946.

Thomas P. Menzies,
Attorney at Law,
548 So. Spring St.,
Los Angeles, California.

As I have told you and written you over and over I do not and will not represent Mr. White in the civil cases. He has not made inconsistent statements to me or to you. Your behaviour is shocking in the case and borders on the unethical.

John T. Holt, Attorney at Law,
1114 San Diego Trust & Sav. Bldg.,
San Diego, Calif.

Case No. 5729 O'C. Std. Accident vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 15 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [192]

[PLAINTIFF'S EXHIBIT NO. 16]

[WESTERN UNION TELEGRAM]

* * * * *

Charge to the account of John T. Holt \$.....

DAY LETTER August 20th, 1946.

Thomas P. Menzies,
548 So. Spring St.,
Los Angeles, Calif.

As I told you I refuse to accept any responsibility in the Civil cases against George White. Mr. White is willing and has always been willing to execute truthful answers to the cases at your request. He states he has repeatedly told you that he fell asleep but that you persist in disregarding his statement. This is to put you on notice that I am not representing Mr. White in the Civil cases.

JOHN T. HOLT

Case No. 5729. Std. Accident vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 16 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [193]

[PLAINTIFF'S EXHIBIT NO. 17]

Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)
August 14 1946.

Messrs. Guthrie, Lonergan and Jordan,
Attorneys at Law,
506 Andreson Building,
San Bernardino, California.
Attention: Mr. John B. Lonergan.

In Re: Michael Lee, a minor, etc., et al.,
vs.
George White, et al.
San Diego County Sup. Ct. No. 134918.

Gentlemen:

Confirming our telephone conversation of even date wherein you agreed to give me to and including the 26th day of August, 1946, within which to file an appearance on behalf of the defendant George White in the above captioned action, I appreciate very much your courtesy in this matter, and it may be that when Mr. White sees the pleadings in this case that he may desire to have counsel other than the writer in this action.

Very truly yours,

Thomas P. Menzies

TPM—K

Case No. 5729 O'C. Std. Accid. vs. Home Ind. Plf. Exhibit. Date 1/21/47. No. 17 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [194]

[PLAINTIFF'S EXHIBIT NO. 18]

Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)
August 15 1946.

Mr. George White,
Beverly-Wilshire Hotel, Room 449,
9514 Wilshire Boulevard,
Beverly Hills, California.

Dear Mr. White:

Please find enclosed herewith two original answers, one in Action No. 134630, entitled Fitzgerald vs. White, the other in Action 134918, entitled Lee vs. White, both of which are now pending in the Superior Court of this state, in and for the County of San Diego.

You will note that both of these answers are prepared in accordance with the sworn statement that you gave to me as attorney for the carrier of the Lincoln Zephyr Sedan owned by the Northumberland Mining Company.

Please read these answers over carefully and make sure that you understand the full import of their contents. If there is any doubt in your mind as to any of the statements that are contained in these answers you may get in touch with me, or if you choose to submit them to your own attorney before signing them you may do so. Both

of these answers will have to be subscribed and sworn to by you before a Notary Public or other officer authorized to administer an oath in this state.

I have secured an extension of time in Action No. 134918 in which to file your answer. This time will expire on Monday, August 26th. The time for answer in Action No. 134630 expired on August 22, 1946.

Will you therefore please have both of these answers returned to my office not later than 10:00 o'clock A. M., August 21st.

No doubt you will recall that on July 31st you informed Mr. Clifton and the writer that you would be able to furnish us with the name and address of a young lady who had seen the damage to the left fender of the Lincoln Zephyr Sedan that you borrowed from the Northumberland Mining Company. Would you please be good enough to furnish me by return mail [195]

#2.

Mr. Menzies to Mr. White. August 15 1946.
with that young lady's name and address in order that we may secure a statement from her.

Thanking you for your prompt attention to this matter,

Yours truly,

Thomas P. Menzies

TPM—K

Enclosures [196]

Case No. 5729 O'C Civ. Standard Accident vs. Home Indemnity. Plf. Exhibit. Date 1/22/47. No. 18 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [197]

[PLAINTIFF'S EXHIBIT NO. 19]

Law Offices of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)

[VIA AIR MAIL]

August 19 1946.

Mr. George White,
Grant Hotel,
San Diego, California.

Dear Sir:

I was today advised by your attorney, Mr. John T. Holt of San Diego, that it was not your wish to execute the answers which we had prepared based on your previous statements to the Company.

Copy of a letter which I am today addressing to Mr. Holt is enclosed herewith and which further sets out the position of The Home Indemnity Company in view of this development.

We return herewith Standard Accident Insurance Company Policy No. J 427867 and Inter-Insurance Exchange of the Automobile Club of Southern California Policy No. 447540, both issued in your favor which you left at the office the other day.

As indicated in the letter to Mr. Holt we have consented to a substitution of attorneys in both cases in order that you may be represented by someone who will conduct the defense in accordance with your views.

For your further information you will note in the letter to Mr. Holt the date upon which appearances are due in both of the cases—one being due on the 22nd of this month and the other on the 26th. It is therefore imperative that you give this matter your immediate attention.

Very truly yours,

Thomas P. Menzies

TPM—K

Enclosures

Registered—Return

Receipt Requested

CC-Md. Holt [198]

Case No. 5729 O'C Civ. Std. Accident vs. Home Ind.
Plf. Exhibit Date 1/22/47. No. 19 in Evidence. Clerk,
U. S. District Court, Sou. Dist. of Calif. Cross, Deputy
Clerk. [199]

[PLAINTIFF'S EXHIBIT NO. 20]

Law Office of
THOMAS P. MENZIES
548 South Spring Street
Los Angeles (13)
August 19 1946.

Mr. John T. Holt,
Attorney at Law,
San Diego Trust & Savings
Building,
San Diego, California.

In Re: Fitzgerald vs. White
Action No. 134630.
Lee vs. White
Action No. 134918.

Dear Mr. Holt:

Confirming our long distance telephone conversation of even date in regard to the above captioned matters, please find enclosed herewith a copy of the complaint in each case.

In the first numbered case, as you know, we filed a motion for change of venue from San Diego County to Los Angeles County, which motion was heard on the 12th of August and denied. Our demurrer was overruled and we were given until the 22nd in which to file our answer.

In the second action (Lee vs. White) we secured an extension of time from the attorneys for the plaintiffs and the answer in that case is due on August 26th.

I am also enclosing herewith a substitution of attorneys and I would suggest that you secure an extension of time in each of these cases in order to permit Mr. White to turn the defense of both of these actions over to the Automobile Club of Southern California and the Standard Accident Company of Detroit.

As you know, I delivered to Mr. White answers in both of these cases which were prepared in accordance with his sworn statement given to us immediately after the accident when all of the facts were fresh in his mind. For your information this statement was repeated to us on two different occasions and there was no material change in its repetition. In view of Mr. White's inconsistent statements in connection with this matter and as you say he told the Automobile Club the truth in regard to the facts and circumstances surrounding [200]

#2.

Mr. Menzies to Mr. Holt.

August 19 1946.

In Re: Fitzgerald vs. White — No. 134630

Lee vs. White — No. 134918.

the accident, in my opinion, he should have no difficulty in convincing them that they should take over and defend these two cases.

For your information I am returning to Mr. White both his Inter-Insurance Exchange Policy of the Automobile Club and the Standard Accident Policy and am enclosing herewith a copy of the letter of transmittal which I am this day forwarding to Mr. White.

With kindest personal regards,

Yours truly,

Thomas P. Menzies

TPM—K

Enclosures

CC-Mr. White [201]

Case No. 5729 O'C Civ. Std. Accident vs. Home Indemnity. Plf. Exhibit. Date 1/22/47. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [202]

[PLAINTIFF'S EXHIBIT NO. 21]

JOHN T. HOLT

Attorney at Law

Suite 1114 San Diego Trust & Savings Building
San Diego, California
Phone Main 8008

August 23rd, 1946.

Thomas P. Menzies,
Attorney at Law,
1014 Fidelity Building,
548 South Spring Street,
Los Angeles 13, California.

Dear Mr. Menzies:

Please find enclosed truthful answers verified by George White in the Fitzgerald vs George White case and Michael Lee et al., vs George White case. Mr. White has always cooperated and has been willing to do so. As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections. You at all times have refused to do so. As you remember, he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and having awakened while driving the car and that the accident

could have happened then. If you will remember several days after this and a very short time after the accident itself, you and I talked by telephone and I asked you to remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge. I merely wish to refresh your recollection about this matter, because I have offered myself as a witness in this regard.

Mr. White makes demand upon you to defend the above referred to cases. It is our understanding that it is the duty of your Company to defend Mr. White and the other defendant in the cases, and Mr. White expects you to do so.

Very truly yours,

JOHN T. HOLT

JTH;hs
encls [203]

Case No. 5729 O'C Civ. Standard Accid vs. Home Ind. Plf. Exhibit. Date 1/22/47. No. 21 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross. Deputy Clerk. [204]

[PLAINTIFF'S EXHIBIT NO. 22]

C O P Y

Law Office of

THOMAS P. MENZIES
548 South Spring Street,
Los Angeles (13)

August 26, 1946.

Mr. John T. Holt,
Attorney at Law,
Suite 1114 San Diego Trust & Savings Building,
San Diego 1, California.

Dear Mr. Holt:

This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all the circumstances surrounding this matter, the Company denies liability in both of these cases.

Very truly yours,

/s/ THOMAS P. MENZIES

TPM—K

Enclosures [205]

Case No. 5729 O'C. Std. Accident vs. Home Ind. Co.
Plf. Exhibit. Date 1/22/47. No. 22 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Cross,
Deputy Clerk. [206]

[PLAINTIFF'S EXHIBIT NO. 23]

August 5, 1946.

Statement of George White, age 52 address Beverly Wilshire Hotel, Beverly Hills Calif. Concerning accident that occurred on July 20, 1946, approx. ?, on highway 101 near Solana Beach Calif.

I was driving Mr. Walter Haggerty Lincoln Sedan. The car is registered in name of Northumberland Mining Co. Mr. Haggerty is an officer of the Company. The Lincoln Sedan is registered in State of Nevada. I had full permission to drive the car from Los Angeles to San Diego as my car was in the repair shop.

I left Los Angeles approx 6:30 PM on July 20, 1946 and drove at average rate of speed. At San Clemente Calif at a Cafe and had 2 cups of coffee.

(drive in)

X George White [207]

Page 2.

I was alone in the car. I had driven on considerable distance, when I must have dozed off to sleep for a moment. The next thing I remember my car was at almost a standstill on the highway, I looked around a moment without getting out of the car then put car in low gear and proceeded on to San Diego. I had entered the City of San Diego when Officers stopped me and took me to Police Station without telling me what I was

being taken in for except that there had been an accident and they were stopping all car.

Later I was booked for man hit & run and suspicion of Manslaughter.

Atty Thomas P. Menzies, 548 So Spring St and L. E. Clifton (Claim Adjuster) and representing the Home Indemnity Co. of New York, insurance carriers for the Northumberland Mining Co. My insurance with, Standard Accident is on a 1942 Packard Coupe Shaughnessy

X George White [208]

Case No. vs. Plf. Exhibit. Date 1/22/47. No. 23 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [209]

[DEFENDANTS' EXHIBIT N]

AGREEMENT OF NON-WAIVER AND
RESERVATION OF RIGHTS.

It is Hereby Mutually Agree, by and between The Home Indemnity Company of New York, and George White, under their Policy No. CAU 6011452, that in the signing of this agreement, or the investigation or defending of any action at law or in equity arising out of an accident which is alleged to have occurred on or about the 20th day of July, 1946, in the County of San Diego,

near Solano Beach, and that in investigating any and all of the facts and circumstances surrounding said accident, and any and all claims of any and every nature whatsoever for personal injuries and property damage arising out of said accident, each party to this agreement specifically reserves unto themselves each and every right and defense which either may have pursuant to the terms and conditions of the above numbered policy of insurance; and that neither party to this agreement shall waive or invalidate any of the terms or conditions of said policy or policies of insurance, and shall not waive or invalidate any rights which either may have of any nature whatsoever, and that each party to this agreement specifically reserves each and every and all and singular rights and defenses which each may have by reason of the terms and conditions of said policy or policies of insurance above numbered herein.

Dated this 26th day of July, 1946, at Los Angeles, California.

THE HOME INDEMNITY
COMPANY OF NEW YORK.

By L. E. Clifton

George White.
(George White)

Case No. 5729 O'C Civ. Std. Accident vs. Home Indemnity. Home Indemnity Exhibit No. N in Evidence. Dated 1/21/47. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk. [210]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial in the District Court of the United States for the Southern District of California, Central Division, before the Honorable J. F. T. O'Connor, Judge of said court, at 2:00 o'clock, P. M., on the 20th day of January, 1947, Paul Nourse, Esq., appearing in behalf of plaintiff, Standard Accident Insurance Company of Detroit, Thomas P. Menzies, Esq., and Harold L. Watt, Esq., appearing in behalf of defendant, Home Indemnity Company of New York, Edgar A. Luce, Esq., appearing in behalf of defendant, George White, John B. Lonergan, Esq., appearing in behalf of defendants, James Carl Fitzgerald, James Richard Osborne, and Michael Lee and Patricia Lee, and evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision, the [211] court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The court finds that the plaintiff is now, and was at the time of the commencement of this action, a resident and citizen of the State of Michigan, and that the defendant, Home Indemnity Company of New York, is now, and was at the time of the commencement of this action, a resident and citizen of the State of New York; that the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, are now, and were at the time of the commence-

ment of this action, residents and citizens of the State of California. The court further finds that the amount involved in this action is in excess of \$3,000.00, exclusive of interest and costs of suit, and that by reason of the facts hereinbefore in this paragraph found this court has jurisdiction over the cause.

2. The court finds that on or about the 2nd day of December, 1945, defendant Home Indemnity Company of New York issued and executed a policy of liability insurance, by the terms of which it agreed to pay on behalf of Northumberland Mining Co., a corporation, Walter Haggerty, or any persons using the Lincoln automobile described in said policy of insurance with the consent of said Walter Haggerty or Northumberland Mining Co., the liability imposed upon them by law for damages, not exceeding \$100,000.00 for each person injured or killed in any one accident and \$300,000.00 for all persons injured or killed in any one accident, because of bodily injury, including death at any time resulting therefrom, caused by accident arising out of the ownership, maintenance or use of said Lincoln automobile, and that said policy of automobile liability insurance is and was in the words and figures set forth in the copy of said policy annexed to the answer of defendant, Home Indemnity [212] Company, herein and marked Exhibit A to said answer, and that said policy of insurance issued by defendant Home Indemnity Company was in full force and effect at all times from the 2nd day of December, 1945, to the 2nd day of December, 1946.

3. The court finds that on or about the 29th day of September, 1945, plaintiff, Standard Accident Insurance Company of Detroit, executed and delivered to defendant, George White, a policy of automobile liability insurance,

wherein and whereby it agreed to pay on behalf of George White or any person using the certain Packard automobile which is described in said policy of insurance with his consent, the liability imposed upon him by law for damages, not exceeding \$25,000.00 for each person injured or killed in one accident and not exceeding \$50,000.00 for all persons injured or killed in any one accident, because of bodily injuries, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the Packard automobile described in said policy; that by the terms of said policy of insurance plaintiff further agreed that if the Packard automobile described in said policy should be withdrawn from normal use because of its breakdown, repair or servicing, the insurance afforded by said policy with respect to said Packard automobile should apply as to any automobile not owned by said George White and which was used by him as a substitute for the Packard automobile described in said policy, but that such insurance should be excess insurance over and above the valid and collectible insurance available to said defendant, George White, under a policy of insurance issued in respect to the substituted automobile driven by him; that said policy of insurance issued by plaintiff is and was in words and figures as set forth in the copy of said policy which is annexed to the complaint on file herein and made Exhibit A to said complaint, and was in force and effect at all times from the 29th day of September, 1945, to the 29th day of September, 1946. [213]

4. The court finds that said policies of insurance issued by defendant, Home Indemnity Company of New York, and by plaintiff, each provided that it was issued

subject to the exclusions, conditions and other terms of the policy, and each contained conditions, among others, as follows:

"When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses."

"The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payments, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

5. The court finds that on the 20th day of July, 1946, the Packard automobile described in the policy of insurance issued by the plaintiff was withdrawn from normal use and was under repair, and that on said day and at the time of the accident hereinafter described defendant George White was using and driving the Lincoln automobile described in the said policy of insurance issued by defendant Home Indemnity Company of New York, with the consent of Walter Haggerty and said Northumberland Mining Co., who were the persons named as

insured in said policy, and that said George White was on the 20th day of July, 1946, and at all times since has been an assured under said policy of insurance issued by defendant Home Indemnity Company of New York. [214]

6. The court finds that on said 20th day of July, 1946, and while said George White was using and driving said Lincoln automobile as hereinbefore found, said Lincoln automobile ran into and collided with Claude McLester Lee and Leana Mae Osborne Lee, and that as result of the injuries sustained in said collision said Claude McLester Lee and Leana Mae Osborne Lee died.

7. The court finds that after the occurrence of said accident, on or about the 23rd day of July, 1946, George White reported said accident to defendant, Home Indemnity Company of New York, but reported that he had not been involved in any accident upon the 20th day of July, 1946, while driving the said Lincoln automobile; that after the 23rd day of July, 1946, and prior to the 31st day of July, 1946, said defendant George White further reported to said Home Indemnity Company of New York that he had fallen asleep while driving said Lincoln automobile on the 20th day of July, 1946, and that the accident in which the aforesaid persons were killed must have happened at that time, and that he, said George White, intended to enter a plea of guilty to a charge brought against him by the People of the State of California that he had failed to stop and render aid at the time of said accident; that thereafter and prior to the 14th day of August, 1946, George White, by and through his attorney, John T. Holt, Esq., did advise the defendant, Home Indemnity Company of New York, that

he could not deny that it was the Lincoln automobile driven by him as aforesaid which had struck and killed the said Claude McLester Lee and Leana Mae Osborne Lee, and again advised said defendant Home Indemnity Company of New York that he had fallen asleep and did not know of the occurrence of the accident, but because of the damage to said Lincoln automobile and other facts which were then known to defendant George White and defendant Home Indemnity Company, he believed that it was said Lincoln automobile driven by him which had been involved in said accident and caused the death of said persons. [215]

The court further finds that all of said reports made by defendant George White to defendant Home Indemnity Company were oral, but that defendant, Home Indemnity Company of New York, requested said oral reports and acted thereon and waived the making of any written report by the defendant George White.

8. The court finds that on or about the 22nd day of July, 1946, defendants, James Carl Fitzgerald and James Richard Osborne, commenced an action in the Superior Court of the State of California in and for the County of San Diego, numbered 134630, against the defendant, George White, and the Northumberland Mining Co., a corporation, named as an assured in the policy issued by defendant, Home Indemnity Company of New York, as aforesaid, wherein they alleged that they were the heirs-at-law of said Leana Mae Osborne Lee, and that the death of Leana Mae Osborne Lee was caused by the carelessness and negligence of defendant George White in the operation of said Lincoln automobile, and that by reason of the death of said Leana Mae Osborne Lee they had been damaged in the sum of \$50,500.00.

9. The court finds that on or about the 6th day of August, 1946, defendants, Michael Lee and Patricia Lee, did commence an action in the Superior Court of the State of California in and for the County of San Diego, numbered 134918, against defendant George White, wherein they alleged that they were the sole heirs-at-law of Claude McLester Lee, and that said Claude McLester Lee was killed by and through the negligence of defendant George White in the operation of said Lincoln automobile, and that by reason of the alleged wrongful death of said Claude McLester Lee they had been damaged in the sum of \$50,000.00.

10. The court finds that defendant, George White, tendered to defendant, Home Indemnity Company of New York, the defense of each of the said actions brought against him in the Superior Court of the State of California in and for the County of San Diego, hereinbefore described, and that defendant, Home Indemnity Company of [216] New York, did accept the defense of each of said actions in his behalf, and did employ an attorney, to wit, one Thomas P. Menzies, Esq., to defend each of said actions in behalf of defendant, George White, and that said Thomas P. Menzies, Esq., did accept said employment and did act in said actions in behalf of defendant George White.

11. The court finds that on or about the 15th day of August, 1946, defendant Home Indemnity Company of New York did cause to be prepared answers for verification by defendant George White, in each of the aforesaid actions in the state court, each of which answers did contain a denial that the Lincoln automobile driven by George White, as aforesaid, had collided with the

said Claude McLester Lee and Leana Mae Osborne Lee, and a denial that the death of said persons was the result of the collision with said Lincoln automobile, and that defendant Home Indemnity Company caused said answers to be presented to said George White and did request said George White to verify said answers, said answers being in the words and figures and form of Plaintiff's Exhibits 12 and 13 received in evidence herein.

12. The court finds that said George White refused to verify said answers tendered to him as hereinbefore found, but the court finds that said George White was justified in refusing to verify said answers, in that, the denials contained therein, that the Lincoln automobile driven by George White had collided with the said Claude McLester Lee and Leana Mae Osborne Lee and that their death had resulted from said collision, were untrue, and were then known by defendant White to be untrue, and were then known by defendant Home Indemnity Company to be untrue.

13. The court further finds that on or about the 23rd day of August, 1946, defendant George White did sign and verify and deliver to defendant, Home Indemnity Company of New York, answers in each of said actions brought in the Superior Court of the State of California in and for the County of San Diego, each of which said answers was substantially in the same form as that tendered to him by defendant [217] Home Indemnity Company for verification as aforesaid, except that by the answers so verified by George White he admitted that the automobile driven by him collided with the persons killed as aforesaid, and did not deny that their death was the result of said collision, said answers

being in words and figures and in the form of the copies thereof admitted into evidence herein and marked, respectively, Plaintiff's Exhibits 2 and 4.

14. The court finds that defendant, Home Indemnity Company of New York, caused to be filed in said state court actions the answers signed and verified by said George White, and delivered to it as last hereinabove found, but that, immediately after the filing of said answers it did deny any and all obligation to defend said actions, or either of them, on behalf of defendant George White, or any obligation or liability to George White under the policy of insurance issued by it, and did cause said Thomas P. Menzies, Esq., to withdraw as attorney for defendant George White.

15. The court further finds that at the time of the commencement of this action actual controversies existed between the parties as to the rights and obligations of plaintiff and defendant, Home Indemnity Company of New York, under their respective policies of insurance, and over the rights of the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, under said policies of insurance; that said controversies were and are that defendant, Home Indemnity Company of New York, at the time of the commencement of this action, claimed and asserted and still claims and asserts that defendant George White had breached the condition of the policy of insurance issued by Home Indemnity Company of New York by failing to cooperate with it in the investigation of the accident hereinbefore described and in the defense of the actions in the Superior Court of the State of California hereinbefore described, and that because of said breach of condition it had been released from all obligations

under said [218] policy of insurance; that the plaintiff and defendants other than the defendant, Home Indemnity Company, contend that defendant, Home Indemnity Company, was at the time of the commencement of the actions and still is obligated to defend said actions in the Superior Court of the State of California in behalf of defendant, George White, and to pay any judgments rendered against him therein within the limits of its policy as hereinbefore found; that the plaintiff asserts and at the time of the commencement of this cause of action did assert that if defendant George White had failed to cooperate with the defendant Home Indemnity Company in the investigation of said accident and the defense of said actions, and had thereby breached the conditions of said policy issued by defendant Home Indemnity Company, he had likewise failed to cooperate with the plaintiff and had breached the conditions of its policy requiring cooperation on his part and that by reason of said breach it had been released from all obligations under its said policy, and further contends that its policy is a policy of excess insurance upon which it is only liable upon claims established against George White in excess of \$100,000.00 as to each of the persons killed in said accident, and that it is only so liable even though defendant White has breached the conditions of the policy issued by defendant Home Indemnity Company requiring him to cooperate with that company in the investigation of the accident and defense of said actions; that the defendants other than defendant Home Indemnity Company assert and at the time of the commencement of this action did assert that the defendant White has not breached the conditions of the plaintiff's policy as to cooperation, and that if defendant Home Indemnity Company has been

released from liability by reason of the breach of the conditions of its policy that the plaintiff's insurance constitutes primary insurance and that it is obligated to pay any judgments against the defendant White up to such limits of its policy as are hereinbefore found. [219]

16. The court finds that defendant George White has at all times cooperated with the defendant Home Indemnity Company of New York in the investigation of the accident hereinbefore described and in the defense of the hereinbefore described actions in the Superior Court of the State of California in and for the County of San Diego, and that defendant George White has not breached any of the conditions of the policy issued by the defendant, Home Indemnity Company of New York, or the plaintiff, Standard Accident Insurance Company of Detroit, upon his part to be performed.

17. The court finds that defendant George White did not, in reporting the accident hereinbefore described to the defendant Home Indemnity Company, make any false, conflicting, misleading or inconsistent statements of fact.

18. The court further finds that the defendant Home Indemnity Company of New York was not misled by any statement made to it by the defendant George White, or by any fact reported to it by said George White, and has not been in anywise prejudiced by any action or statement or omission of George White.

19. The court finds that George White did report to defendant Home Indemnity Company of New York that he fell asleep while driving the Lincoln automobile on the 20th day of July, 1946, at the time of the accident hereinbefore described, and that by reason of falling asleep he did not know that said accident had occurred. The

court further finds that defendant George White has never restricted said statement, but in fact has under oath testified to said statement of facts in this action and will testify to said statement of facts, if called upon so to do, at the time of the trial of the aforesaid actions in the Superior Court of the State of California.

The court further finds that there is evidence from which an inference might be drawn that George White knew that said accident had occurred and wilfully failed to stop and render aid, but the court finds that such evidence is not sufficient in this action to [220] prove that the statement of George White was wilfully false, and the court further finds that the defendant, Home Indemnity Company of New York, had the right to assume the defense of George White in said state court actions, and that it did assume the defense of said George White in said state court actions, and that having assumed said defense it was and is the duty of Home Indemnity Company of New York to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as said George White maintains that said statement is true, and that said Home Indemnity Company is estopped in this action to assert the untruth of said statement or to assert that by reason of said statement he has failed to cooperate with it in the investigation and defense of the claims made by the plaintiffs in said state court actions.

20. The court finds that it was the duty of defendant George White to plaintiff under the terms and conditions of the policy issued by plaintiff to cooperate with defendant Home Indemnity Company in the defense of said actions in the Superior Court of the State of California, and the court further finds that the defendant George

White has performed said duty and that, having cooperated with defendant Home Indemnity Company in the defense of said actions, there has been no breach by him of the conditions of plaintiff's policy requiring him to cooperate with it.

21. The court finds that the policy of insurance issued by said Home Indemnity Company of New York at the time of the commencement of this action did constitute, and does now constitute, valid and collectible insurance against the claims asserted in said actions in the state court in the sum of \$100,000.00 as to the claims asserted in each of said actions, and that by the terms of said policy defendant Home Indemnity Company is obligated to pay the cost of defending George White in each of said actions, and is obligated to pay any judgment rendered against him therein not exceeding a [221] judgment in the sum of \$100,000.00 in each of said actions; that the policy of insurance issued by plaintiff, Standard Accident Insurance Company of Detroit, did constitute at the time of said accident and has at all times constituted excess insurance over and above the insurance afforded as aforesaid by the policy issued by defendant Home Indemnity Company of New York, and that said Standard Accident Insurance Company of Detroit is obligated to pay such part of any judgment against George White rendered in either of said actions as is in excess of \$100,000.00, but not beyond the sum of \$25,000.00.

22. The court finds that the defendant Home Indemnity Company of New York was on the 20th day of July, 1946, and ever since has been and still is solvent and able to pay any judgments that may be rendered against

defendant George White in said state court actions within the limits of said policy of insurance issued by the defendant Home Indemnity Company of New York.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the court concludes:

1. Defendant, Home Indemnity Company of New York, is obligated to pay the reasonable expense incurred by defendant, George White, in the defense of the action brought in the Superior Court of the State of California in and for the County of San Diego by defendants James Carl Fitzgerald and James Richard Osborne, being action No. 134630 in said court, and is obligated to pay the reasonable expense incurred by defendant, George White, in the defense of the action brought against him by Michael Lee and Patricia Lee in the Superior Court of the State of California in and for the County of San Diego, being action numbered 134918 in said court; that the defendant, Home Indemnity Company of New York, is obligated to pay any judgment rendered against defendant George White in said action in the Superior Court of the State of California in and for the County of San Diego, numbered 134630, up to but not exceeding the amount of \$100,000.00, [222] and is obligated to pay any judgment rendered against said George White in said action in the Superior Court of the State of California in and for the County of San Diego, numbered 134918, up to but not exceeding the amount of \$100,000.00.

2. That the insurance afforded by the policy issued by the plaintiff, Standard Accident Insurance Company

of Detroit, to the defendant, George White, constitutes excess insurance over and above that afforded by the policy of Home Indemnity Company of New York, and that under said policy the plaintiff is not obligated to pay any part of any judgment that may be rendered against said George White in either of said actions in the Superior Court of the State of California in and for the County of San Diego, except so much thereof as shall be in excess of \$100,000.00, but is obligated to pay such part of any judgment in either of said actions as is in excess of \$100,000.00, not to exceed however \$25,000.00 of such excess; that the plaintiff is not obligated to pay any part of the expense of defending said actions.

3. That judgment should be rendered herein declaring the rights of the parties in accordance with the foregoing Findings of Fact and Conclusions of Law.

4. That plaintiff and defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, do each have and recover their costs against defendant, Home Indemnity Company of New York, to be hereinafter taxed in accordance with the rules of this court.

Dated: February 27, 1947.

J. F. T. O'CONNOR
District Judge

Approved as to form: Thomas P. Menzies, Harold L. Watt; by [223]

Received copy of the within Findings this 21st day of Feb., 1947. H. L. Watt, Thomas P. Menzies, Attorneys for Home Ind. Co.

[Endorsed]: Filed Feb. 28, 1947. [224]

In the District Court of the United States
Southern District of California
Central Division
No. 5729 O'C

STANDARD ACCIDENT INSURANCE COMPANY
OF DETROIT, a corporation,

Plaintiff,

vs.

HOME INDEMNITY COMPANY OF NEW YORK,
a corporation, GEORGE WHITE, JAMES CARL
FITZGERALD, JAMES RICHARD OSBORNE,
MICHAEL LEE and PATRICIA LEE,

Defendants.

DECLARATORY JUDGMENT

This cause came on regularly for trial in the District Court of the United States for the Southern District of California, Central Division, before the Honorable J. F. T. O'Connor, Judge of said court, at 2:00 o'clock, P. M., on the 20th day of January, 1947, Paul Nourse, Esq., appearing in behalf of plaintiff, Standard Accident Insurance Company of Detroit, Thomas P. Menzies, Esq., and Harold L. Watt, Esq., appearing in behalf of defendant, Home Indemnity Company of New York, Edgar A. Luce, Esq., appearing in behalf of defendant, George White, John B. Lonergan, Esq., appearing in behalf of defendants, James [225] Carl Fitzgerald, James Richard Osborne, and Michael Lee and Patricia Lee, and evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision, and the court having signed and filed its written and special Findings of Fact and Conclusions of Law,

Now, Therefore, in accordance with the evidence and said Findings of Fact and Conclusions of Law, It Is

Ordered, Adjudged and Decreed as and for the Declaratory Judgment of this court, as follows:

1. That the instrument entitled, "Policy No. CAU 6011452," dated the 2nd day of December, 1945, copy of which is annexed to the answer of defendant Home Indemnity Company of New York herein as Exhibit A to said answer, and which has been received in evidence herein as Defendant's Exhibit C, was on the 20th day of July, 1946, and at all times since said date has been a valid and subsisting policy of liability insurance, and that the defendant, George White, is a person insured under said policy, that said George White has not breached any of the terms or conditions of said policy but has performed all of the terms and conditions of said policy upon his part to be performed; and that the insurance afforded by said policy is and at all times since the 20th day of July, 1946, has been valid and collectible.
2. That under and by virtue of the terms of said policy of insurance defendant, Home Indemnity Company of New York, is obligated to pay the reasonable expenses incurred by defendant George White in the defense of each of those certain actions now pending in the Superior Court of the State of California in and for the County of San Diego, entitled respectively, "James Carl Fitzgerald, a minor, by and through his Guardian ad litem, James Richard Osborne, and James Richard Osborne, Plaintiffs v. George White and North Lumberland Mining Company, Defendants," numbered 134630, and "Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their [226] Guardian ad litem, Plaintiffs v. George White, et al., Defendants," numbered 134918.

3. That defendant, Home Indemnity Company of New York, under and by virtue of the terms and conditions of said policy of insurance, is obligated to pay any judgment that may be rendered against said George White in said action numbered 134630 in said Superior Court of the County of San Diego up to but not in excess of the sum of \$100,000.00.

4. That defendant, Home Indemnity Company of New York, under and by virtue of the terms and conditions of said policy of insurance, is obligated to pay any judgment that may be rendered against said George White in said action numbered 134918 in said Superior Court of the County of San Diego up to but not in excess of the sum of \$100,000.00.

5. That the instrument, copy of which is annexed to the complaint on file herein, entitled "Policy No. J 427867," dated September 29, 1945, marked Exhibit A to said complaint, and which has been received in evidence herein and marked "Defendant's Exhibit B," was on the 20th day of July, 1946, and at all times since said date has been a valid and subsisting policy of liability insurance, and that the defendant George White is the person insured under said policy of insurance, and that defendant George White has not breached any of the terms or conditions of said policy upon his part to be performed, but has performed all of said terms and conditions; that the insurance afforded by said policy of insurance constitutes excess insurance over and above the insurance afforded by said policy of insurance issued by defendant, Home Indemnity Company of New York.

6. That the plaintiff is only obligated under and by virtue of said policy of insurance, received in evidence

and marked "Defendant's Exhibit B," to pay such amount, not exceeding \$25,000.00, of any judgment that may be rendered against George White in said action [227] No. 134630 now pending in the Superior Court of the State of California in and for the County of San Diego as shall be in excess of \$100,000.00, but is obligated to pay said amount of said excess.

7. That the plaintiff is only obligated under and by virtue of said policy of insurance, received in evidence and marked "Defendant's Exhibit B," to pay such amount, not exceeding \$25,000.00, of any judgment that may be rendered against George White in said action No. 134918 now pending in the Superior Court of the State of California in and for the County of San Diego as shall be in excess of \$100,000.00, but is obligated to pay said amount of said excess.

8. That the plaintiff, Standard Accident Insurance Company of Detroit, is not obligated to bear or pay any part of the expense of the defense by or on behalf of said George White of either of said actions, numbers 134630 and 134918, now pending in the Superior Court of the State of California in and for the County of San Diego.

9. That the plaintiff, Standard Accident Insurance Company of Detroit, and each of the defendants, George White, James Carl Fitzgerald, James Richard Osborne, Michael Lee and Patricia Lee, are entitled to judgment against defendant, Home Indemnity Company of New York, for their costs incurred herein, to be hereinafter taxed in accordance with the rules of this court.

Costs taxed at \$172.32.

Done in open court this 27 day of February, 1947.

J. F. T. O'CONNOR

District Judge

Approved as to form: Thomas P. Menzies, Harold L. Watt; by

Judgment entered Feb. 28, 1947. Docketed Feb. 28, 1947. Book C. O. B. 41, page 828. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy.

Received copy of the within judgment this 21st day of Feb., 1947. H. L. Watt, Thomas P. Menzies, Attorneys for Home Ind. Co.

[Endorsed]: Filed Feb. 28, 1947. [228]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given That the defendant Home Indemnity Company of New York does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment given and made in the above entitled action in favor of the plaintiff therein and against the defendant Home Indemnity Company of New York, and entered on the 28th day of February, 1947, in Civil Order Book No. 41, page 828, and from the whole and every part of said judgment.

Dated this 26th day of May, 1947.

THOMAS P. MENZIES and
HAROLD L. WATT
By Thomas P. Menzies

Attorneys for Defendant Home Indemnity Company of New York, a Corporation [229]

[Affidavit of Service by Mail]

[Endorsed]: Filed May 27, 1941. [231]

[Title of District Court and Cause]

BOND ON APPEAL

Know All Men By These Presents:

That we, Home Indemnity Company of New York, as Principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact a surety business in the State of California, as surety, are held and firmly bound unto Standard Accident Insurance Company of Detroit in the full and just sum of Five Hundred and No/100 (\$500.00) Dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, successors, and assigns, jointly and severally, firmly by these presents:

Whereas, Honie Indemnity Company of New York, Defendant, has on this 27th May, 1947, filed with the above court notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit of the State of California, and,

Whereas, the said court in the above entitled cause ordered said appellant to file an Appeal Bond in the sum of Five Hundred and No/100 (\$500.00) Dollars in compliance with Rule 73, Paragraph D of the Rules of Civil Procedure of the District Courts of the United States.

Now, Therefore, the condition of the above obligation is such that the Defendant and Appellant, Home Indemnity Company of New York shall prosecute said appeal

and will answer to the satisfaction of the judgment in full together with costs and interest if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs and interests as the Appellate Court may adjudge and award, then the above obligation will be void; otherwise to remain in full force and effect.

In Witness Whereof, the Principal has hereunto set its hand and seal, and the Surety has caused this bond to be executed by its duly authorized Attorney-in-Fact and caused its corporate seal to be hereunto affixed at Los Angeles, California, this 27th day of May, 1947.

HOME INDEMNITY COMPANY OF
NEW YORK

By George Willsey

(Corporate Seal)

HARTFORD ACCIDENT AND INDEMNITY
COMPANY

By Glen Huntsberger, Jr.

Attorney-in-Fact

Examined and recommended for approval as provided in Rule #8. Thomas P. Menzies, Attorney.

Bond approved

J. F. T. O'CONNOR
Judge

This Bond Carries an Annual Premium of \$10.00.

[Verified]

[Endorsed]: Filed May 27, 1947. [232]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 243, inclusive, contain full, true and correct copies of Complaint for Declaratory Relief including Exhibit A thereto which is Defendant's Exhibit B in Evidence; Answer of Defendant Home Indemnity Company of New York including Exhibit A thereto which is Defendant's Exhibit C in Evidence; Answer of Defendant George White; Answer of Defendants James Carl Fitzgerald et al.; Answer of Defendants Michael Lee et al.; Interrogatories Propounded by Plaintiff to Defendant Home Indemnity Company of New York; Answers of Defendant Home Indemnity Company of New York to Interrogatories Propounded by Plaintiff which includes Plaintiff's Exhibits 6 and 7 in Evidence; Interrogatories Propounded by Defendant Home Indemnity Company of New York to Plaintiff which is also Defendant's Exhibit A in Evidence; Answer to Interrogatories Propounded by Home Indemnity Company of New York to Plaintiff; Minute Order Entered December 23, 1946; Further Answer to Interrogatories Propounded by Home Indemnity Company of New York to Plaintiff which are also a portion of Defendant's Exhibit A in Evidence; Request of Defendant Home Indemnity Company of New York for Admissions Under Rule 36; Answer of

Plaintiff to Request for Admissions Under Rule 36; Answer to Request for Admissions Filed by Defendant Home Indemnity Company of New York; Request for Admissions Under Rule 36 of Plaintiff which includes Plaintiff's Exhibits 8, 12 and 13 in Evidence; Answer of Home Indemnity Company of New York to Request of Plaintiff for Admissions which includes Plaintiff's Exhibits 5, 9, 10 and 11; Amendment to Complaint; Plaintiff's Exhibits 1, 2, 3, 4, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23; Defendant's Exhibit N; Findings of Fact and Conclusions of Law; Declaratory Judgment; Notice of Appeal; Bond on Appeal; Defendant's Designation of Record on Appeal; Appellees' Designation of Additional Portions of Record to be Included in Record on Appeal and Plaintiff's Designation of Additional Portions of Record to be Included in Record on Appeal which, together with Original Defendant's Exhibits D, E, F, G, H, I, J, K, L and M and copy of two volumes of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$61.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, January 20, 1947

Appearances:

For the Plaintiff: Nourse & Jones, by Paul Nourse, Esq.

For the Defendant Home Indemnity Company of New York: Thomas P. Menzies, Esq., and Harold L. Watt, Esq.

For the Defendant George White: Luce, Forward, Lee & Kunzel, by Edgar A. Luce, Esq.,

For the Defendant Mildred E. Taylor, guardian ad litem of Michael Lee and Patricia Lee: William Guthrie, John B. Lonergan and Donald W. Jordan, by John B. Lonergan, Esqs. [1*]

For the Defendant James Carl Fitzgerald, a minor, by his guardian ad litem, James Richard Osborne; and James Richard Osborne: Edgar B. Hervey, Esq., by John B. Lonergan, Esq. [2]

Los Angeles, California, Monday, January 20, 1947,
2:00 P. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 5729 Civil, Standard Accident Insurance Company v. Home Indemnity Company and others; motion of plaintiff for leave to amend complaint and also for court trial.

*Page number appearing at top of page of original Reporter's Transcript.

Mr. Nourse: I ask leave now to file the amended complaint which has been served on counsel and which is in accordance with the notice served 10 days ago.

The Clerk: Is it ordered filed, your Honor?

The Court: It is ordered filed.

You may proceed.

Mr. Nourse: I think that I can be of aid to the court by making an opening statement as to the issues here involved and the facts that are admitted. But I think Mr. Lonergan wished to state to the court that during today he is representing the defendants Fitzgerald and Osborne as well as the defendants Lee because Mr. Edgar Hervey found himself still engaged in a jury trial in San Diego County.

Mr. Lonergan: That is correct, your Honor. Mr. Hervey is engaged in trial and will try to be here in the morning. In the meantime he has asked me to represent him in appearing for the defendant James Carl Fitzgerald, a minor, and the defendant James Richard Osborne. [3]

I am appearing here, of course, as counsel of record for Michael Lee, a minor, Patricia Lee, a minor, and Mildred Taylor as their guardian.

The Court: Are all the parties now identified in the record?

Mr. Nourse: I think they are in the clerk's record, your Honor.

The Court: Identify them all, Mr. Cross.

The Clerk: Yes, your Honor. My record shows that Mr. Paul Nourse of Nourse and Jones is present in court as representing the Standard Accident Insurance Company of Detroit; also that Mr. John B. Lonergan is

present in court for Mildred E. Taylor, guardian ad litem of Michael Lee and Patricia Lee, and that today he also represents Mr. Edgar B. Hervey who is counsel for James Carl Fitzgerald, a minor, and his guardian ad litem, James Richard Osborne, and also for James Richard Osborne; that Mr. Thomas Menzies is in court together with Harold L. Watt and that these two lawyers represent the Home Indemnity Company of New York; that Edgar A. Luce is also present in court from the firm of Messrs. Luce, Forward, Lee and Kunzel, representing the defendant George White.

Do I understand that Mr. George White is present?

Mr. Luce: Yes, he is present.

The Court: Are you Mr. George White? [4]

Defendant George White: Yes.

The Clerk: That is what my record shows, your Honor.

The Court: Proceed.

Mr. Nourse: Your Honor, before I make my opening statement I think I can let one of the witnesses go. Mr. Hervey asked his client Osborne to come up to testify as to residence, but counsel I think are all willing to stipulate as follows:

That the Home Indemnity Company of New York is a corporation organized and existing under the laws of New York, a citizen of that state;

That the plaintiff, Standard Accident Insurance Company of Detroit, is a corporation organized and existing under the laws of the State of Michigan; that both of those insurance corporations are authorized to do business in this state:

That all of the other defendants, that is, George White, James Carl Fitzgerald, James Richard Osborne,

Michael Lee and Patricia Lee, are now and were at the time of the commencement of this action citizens of the State of California.

I believe that covers all the parties and the facts on which diversity of citizenship is established.

Is it so stipulated, gentlemen?

Mr. Menzies: So stipulated.

Mr. Lonergan: So stipulated.

Mr. Luce: So stipulated. [5]

Mr. Nourse: And if I may advise Mr. Osborne, who is up from down in San Diego County—

Mr. Lonergan: I will do it.

Mr. Nourse: I think he is seated right back there. I think I see him.

The Court: Mr. Osborne may be excused.

Mr. Nourse: This action, your Honor, is one for declaratory relief by which the parties seek to have their respective rights and liabilities under two separate policies of insurance declared by the court.

The facts out of which the controversies arise are as follows:

The defendant, Home Indemnity Company of New York, issued a policy of automobile liability insurance upon a Lincoln car which was the property of the Northumberland Mining Company.

This policy of insurance had liability limits of \$100,000 for each person injured, not to exceed \$300,000 for claims arising out of any one accident.

The defendant George White was, on July 26, 1946, insured by a policy issued by the plaintiff on a Packard automobile and had a clause (and I will get the facts as clearly as I can before the court) that provided that if White's automobile was temporarily out of use through

repair and he was driving another car, that it should cover him while driv- [6] ing that car; but if there was insurance on the other car that his policy and the plaintiff's policy should be excess insurance over and above the valid and collectible insurance which was afforded by the policy on the other car.

White on the evening of July 20th, bound from Los Angeles to San Diego, was driving the Lincoln car insured by the Home's policy and with the limits of liability that I have mentioned.

On that night he was involved in an accident near Solano Beach.

In this accident two persons were killed. They had just been married, having returned from Tijuana, and were crossing the highway on foot at Solano Beach.

These persons were Claude McLester Lee and Leana Mae Lee.

White continued on to San Diego, was stopped by the police and later placed under arrest; and on July 22nd he made an oral report to the Home Indemnity Company.

The Court: What year?

Mr. Nourse: 1946. These facts all occurred in 1946, your Honor.

On the morning of the 23rd his statement was taken by Mr. Menzies, the attorney for the Home, and Mr. Clifton, its claims representative, which has been described and which will be before the court here as an exhibit to the answers of [7] the Home Indemnity to the plaintiff's interrogatories.

That statement contained a denial that Mr. White had been in any accident whatsoever. He said that he had no knowledge of being in any accident and also made certain statements as to damage to his car and he said

that the headlight had been damaged at the race track that afternoon and he described that damage; that the headlight was bashed in.

He later made a report to them orally or made it through his counsel (I am not sure which way the evidence will show) in which he stated that he had fallen asleep while near Solano Beach and awakened with his car moving down the highway; that from the evidence that he had then seen, pictures of the car, the fact there was human blood on it, the fact of the imprint of clothing, that he believed that the accident had happened there and that his car had hit and struck these people;

That on the 31st of July he pleaded guilty to a charge of hit and run driving.

The evidence will show that shortly after that time and after the Home had been advised of the plea of guilty (in fact, they were in court at the time it was made, present at the coroner's inquest and heard the evidence as to the damage to the car and examined the car) they were advised that White would not sign an answer which denied the happening of the ac- [8] cident because he did not believe such an answer was true.

The evidence will show that Mr. Menzies took to him answers in both the state court actions in which the happening of the accident was denied; that when Mr. White refused to verify those answers, he was advised by his counsel not to and they did not contain the truth;

That on August 23, 1946, White did sign and verify the answers which were substantially in the same form as the answers that had been prepared by Mr. Menzies, except that they did admit the occurrence of the accident and that these two persons died as a result of the injuries sustained therein. The deaths were admitted.

but the fact that the automobile, the Lincoln, had been the cause of death was denied in the answer tendered by Mr. Menzies.

The evidence will show that thereupon Mr. Menzies returned the answers to Mr. Holt, the attorney for Mr. White, or to Mr. White, I am not sure—it was a letter to Mr. Holt, anyway—stating that inasmuch as Mr. White had refused to sign the answers and that his statements to the company had been inconsistent; that they would not defend him;

That thereafter, however, they did telephone to the office of Mr. Holt, asked that the answers be returned and caused them to be filed—Mr. Menzies did—in the state court actions. [9]

I think the following day Mr. Menzies caused a motion to be filed or notice of motion in the Superior Court in each of the state actions asking to be relieved from the obligation to defend Mr. White further in those actions on the grounds that there was a conflict of interest between himself and Mr. White. I don't remember the grounds that Home had in denying liability.

The true controversy then that arises is this:

Has White so violated the Home's policy as to relieve it from its obligations, both to defend him in the state court actions and to indemnify him from any judgments that might be rendered therein?

If the court finds that the answers to that controversy or interrogatory, I might say, is in the negative and that he has not breached the Home's policy, that in effect brings an end to this litigation.

If, however, the court should find that there had been a breach of the Home's policy, that that breach was prejudicial to the Home and there will be a controversy on

the Home's part as to whether it need be prejudicial or not, then the remainder of the controversies comes in:

First, is the Standard's policy excess? I think one of counsel will contend that it was always co-insurance with that of the Home's.

If it was excess, has White also breached the terms of [10] that policy so as to relieve the plaintiff? And furthermore if he has not in that manner breached it, can he, by wilfully violating the Home's policy, change the position of the Standard Accident Insurance Company from the point where it had no obligation or liability until White had been held liable as to each person suing him in excess of \$100,000 to where it would be liable for the first dollar of any judgment?

The main controversy and the one which I believe will settle this thing is whether or not there has been a violation of this clause of the Home's policy which is the same clause, exactly the same words, as in the Standards policy. It is a condition of the policy and reads as follows:

"Assistance and cooperation of the insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. . . ."

It is that clause which the Home claims to have been breached and by the breach of which it claims that it has been released from liability under its policy.

I think, your Honor, that the statement covers in substance the main facts, of course, not the details of the evidence. There are a number of admissions that have

been made, [11] however, by the pleadings; and I think I should state those to the court so that the court will see there is very little left to be proved by the plaintiffs and the defendants other than the Home to make a *prima facie* case against the Home and that the burden is then shifted to it to show the breach of the conditions and that it is excused from liability.

I think all the jurisdictional facts are admitted by the pleadings and by the stipulations which have just been made.

It is further admitted by the admissions of the Home, in answer to our interrogatories, that it was at all times solvent, is now and has at all times been solvent and financially able to pay the claim made against the defendant George White;

That the plaintiff issued the policy of insurance marked Exhibit A and attached to its complaint;

That the Home issued the policy attached to its answer and marked Exhibit A;

That White was driving the Lincoln automobile covered by the Home's policy and was driving it with the consent of the name assured therein, the North Lumberland Mining Company. It is admitted further that the Packard automobile insured by the plaintiff's policy was out of repair and so that the clause of that policy covering him while driving another car, subject to its terms, the insurance being excess, was in effect. [12]

It is admitted that while driving—

The Court: Just a moment, counsel.

Mr. Nourse: Yes, sir.

The Court: State No. 5, the last one, again, please.
(Record read by the reporter.)

The Court: State the last one, No. 5, as I have it here, "Admissions."

Mr. Nourse: I haven't got them numbered.

The Court: Well, the last one.

Mr. Nourse: That White was at the time of the accident driving the Lincoln automobile and that that was with the consent of the named assured in that policy, the North Lumberland Mining Company;

That at that time—I am going back a little ways, your Honor, so as to pick it up.

The Court: Yes. I have that one. All right.

Mr. Nourse: That at that time the Packard automobile described in the policy was out of repair, temporarily out of repair.

The Court: So that condition applied?

Mr. Nourse: So that the condition of the policy extending coverage to the use of another car applied.

That on the evening of July 20th the accident in question occurred;

That the car collided with Claude McLester Lee and Leana [13] Mae Osborne Lee; that as a result of the injuries therein sustained they died.

It is further admitted that Michael Lee and Patricia Lee have brought an action against George White in the Superior Court of the County of San Diego in which they claim to be the children and sole heirs at law of Claude McLester Lee and claim that by reason of his wrongful death they have been damaged in the sum of \$50,000 and that that action is on account of the death of Claude McLester Lee in the accident which is described in the complaint;

That James Fitzgerald and James Osborne have commenced an action against defendant George White in

which they claim they are respectively the son and father of Leana Mae Osborne Lee and that by reason of her death James Carl Fitzgerald has been damaged in the sum of \$50,000 and James Richard Osborne in the sum of \$500.

It is further admitted that the defense to each of those actions was tendered to the defendant Home Indemnity Company and that it did accept the defense of such actions and did employ an attorney, to-wit, Thomas B. Menzies, to defend each of said actions on behalf of the defendant White.

It is further admitted that the Home Indemnity Company now denies any liability to George White under its policy and did make such denial prior to the commencement of this action;

That it had prior to the commencement of the action and [14] still does refuse to defend the state court actions or to pay any judgments against White.

That portion of the complaint was denied by Mr. Hervey in his answer on behalf of Fitzgerald and Osborne, but I understand that he now stipulates that the facts which I have just related as to the denial of liability—well, he desires to admit (and I can make it shorter than that) the allegations of paragraphs XVI and XVII of the complaint. That is XVII as amended?

Mr. Lonergan: As amended.

The Court: Who is it that denies that?

Mr. Nourse: Fitzgerald and Osborne had denied it, your Honor, in their answer for want of information and belief. I understand they now withdraw those denials and admit the facts alleged in paragraphs XVI and XVII as amended.

Is that true, Mr. Lonergan?

Mr. Lonergan: That is correct.

Mr. Nourse: That leaves to make a *prima facie* case here—

The Court: What are XVI and XVII so we will have that connected up in the record?

Mr. Nourse: The allegation of paragraph XVI—shall I read the whole paragraph?

The Court: Yes.

Mr. Nourse: "That the defense of said actions No. [15] 134918 and No. 134630 was, by the defendant George White tendered to defendant, Home Indemnity Company of New York, and that said Home Indemnity Company of New York did accept the defense of said actions, and did employ an attorney, to wit, one Thomas P. Menzies, to defend each of said actions on behalf of defendant George White herein, but that said defendant, Home Indemnity Company of New York, does now deny any liability to defendant George White under its policy of insurance issued to said North Lumberland Mining Company, and refuses to further defend or cause to be defended said George White in said actions, or either of them. Plaintiff is informed and believes, and therefore alleges, that said defendant, Home Indemnity Company of New York, will refuse to pay any judgment that may be rendered in said action No. 134918 or in said action No. 134630 against defendant herein, George White, or to pay any part of any such judgments, or to in anywise perform any of the terms or conditions of the policy of insurance issued by it as aforesaid."

As amended, your Honor, it is very long; and it merely sets forth the controversies that exist here, what the claims of each party are.

Does your Honor desire to have it read?

The Court: No. I just wanted to know what the subject of it is.

Mr. Nourse: Now I shall make the rest of the prima [16] facie case, your Honor, through the introduction of certain pleadings here so the court may be fully advised as to the condition of the state court actions and by certain admissions made in the request for admissions by the Home Indemnity Company.

I offer now a copy of the complaint in the action of James Carl Fitzgerald, a minor, by and through his guardian ad litem, James Richard Osborne, and James Richard Osborne, vs. George White and North Lumberland Mining Company, defendants; action No. 134630, in the Superior Court of the State of California, in and for the County of San Diego.

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: That will be Plaintiff's Exhibit No. 1.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Nourse: Counsel for the defendants, Lee, called to my attention that he also had denied paragraph XVII but now admits XVII and now admits the facts as therein alleged.

Mr. Lonergan: That is correct, your Honor.

The Court: The record will so show.

Mr. Nourse: I now offer the answer filed by the defendant George White in action No. 134630 in the Superior Court of the State of California, in and for the County of San Diego. [17]

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 2 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Nourse: I now offer the complaint in the action, Michael Lee, a minor, and Patricia Lee, a minor, by Mildred E. Taylor, their guardian ad litem, plaintiff's, vs. George White, John Doe and Doe Corporation, defendants, being action No. 134918, in the Superior Court of the State of California, in and for the County of San Diego.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 3 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Nourse: I now offer the answer filed by the defendant George White or on his behalf to the complaint in action No. 134918.

The Court: In evidence.

The Clerk: Plaintiff's Exhibit No. 4 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Nourse: The file has gotten a little voluminous, your Honor.

I now offer in evidence the admission by the defendant, Home Indemnity Company, in answer to the plaintiff's interrogatories No. 20. The interrogatory is as follows:

"That at all times from July 20, 1946, to and including August 23, 1946, Thomas B. Menzies was acting as attorney for you."

This interrogatory being addressed to the defendant Home Indemnity Company, the answer being:

"To request No. 20 admits that at all times from July 20, 1946, to and including August 23, 1946, Thomas B. Menzies was acting as attorney for this defendant."

The Court: That is Home Indemnity Company?

Mr. Nourse: Yes, Home Indemnity, the defendant Home Indemnity Company.

I next offer in evidence their answers to our interrogatories.

Mr. Menzies: Answers of the Home?

Mr. Nourse: Yes, answers of the Home Indemnity Company to plaintiff's interrogatories 5, 8, 9 and 10. If you will bear with me a minute, I will get my fingers in the right place here so I can refer back and forth.

Interrogatory No. 5 is:

"Did the defendant George White report to you the accident described in paragraph XIII of the complaint on file here?"

I will read all of the interrogatories and the answers as they all connect up, your Honor. [19]

The Court: That is connected with the former part. That means, Did George White make a report to the Home Indemnity Company?

Mr. Nourse: That is right, your Honor.

The Court: Proceed.

Mr. Nourse: "8. If your answer to interrogatory No. 6 is that said report was not in writing, state whether or

not the report was made before and reported by a short-hand reporter.

"9. If your answer to interrogatory No. 8 is that said oral report was recorded by a shorthand reporter, state the name of the reporter and whether or not you have a transcript of such report.

"10. If your answer is you have a transcript of the said report, attach a full, true and complete copy of such transcript."

The answer being:

"5. Yes," which is that it was reported to them.

8. that it was taken down in shorthand; that it was before R. B. Whitcomb, official shorthand reporter, and that they had a transcript; and 10 sets forth the transcript.

We now offer the answers and the transcripts of the report of George White, taken on August 23rd and which is attached to the answers of the defendant Home to the plaintiff's interrogatories. [20]

The Court: In evidence.

Mr. Lonergan: Was that July 23rd?

Mr. Nourse: I should have said July. Thank you.

The Court: I have July 20th to August 23rd.

Mr. Menzies: That's right.

Mr. Nourse: I now offer the answers of the Home to the plaintiff's interrogatories Nos. 13 and 14. The interrogatories were:

"If your answer to interrogatory No. 5 is . . ."

Mr. Menzies: Pardon me, Mr. Nourse. Did the court number interrogatories 5, 8, 9 and 10?

The Court: 5, 8, 9 and 10.

Mr. Menzies: That is marked Exhibit 6, and I assume that will be Exhibit 7 now that you are offering? Or are you offering the whole as one?

The Court: Whichever way counsel desires. The court has no preference.

Mr. Nourse: I think they should be exhibits in order; so in the record they will be referred to.

The Clerk: I have not been numbering these, your Honor, because I didn't have them.

Mr. Nourse: They are in the record now. I do not presume it is necessary to remove them from the record and offer them in. They are part of the files in this action.

The Court: That will be sufficient identification, be-[21] cause counsel can pick them up in the record.

Mr. Menzies: That is satisfactory. But I noticed here that one clerk was not numbering them, and I had been numbering them and I wanted to get them corrected.

All of the interrogatories will be Exhibit 5, then, I take it?

Mr. Nourse: Each one as offered will be separate. Now, this one I am about to offer is 13.

Mr. Menzies: I think it is confusing to the clerk when they are all numbered in there, your Honor. I would suggest that we offer them all, if you intend to, or you can withdraw all that you don't intend to offer.

Mr. Nourse: I am now offering, your Honor, in evidence defendant Home Indemnity Company's answer to plaintiff's interrogatories Nos. 13 and 14.

The interrogatories were: "If your answer to interrogatory No. 5 is that George White did report to you said accident, state whether or not after the date of his original report he made any further report to you of any fact concerning said accident or his knowledge thereof."

"14. If your answer to interrogatory No. 13 is that he did make a further report, attach a copy thereof hereto. If said additional report was in writing or if it was oral, state the substance of said additional report and give the date of making of said additional report and the name and addresses [22] of the persons present."

The answer is to both interrogatories by their answer 13, which is as follows:

"In answer to the 13th interrogatory it saith:

"He did not report any additional facts of his knowledge of the accident other than that he said 'he must have gone to sleep' and that 'he might have hit the victims while asleep without knowing it.' "

They did not supply the date of that information or the names of the persons to whom it was made.

Right there it calls my attention to the fact that you failed to verify or swear to your interrogatories in accordance with the rules. And you waive that?

Mr. Menzies: Certainly.

Mr. Nourse: You do not raise any question as to the fact that he had not sworn to it?

Mr. Menzies: No, Mr. Nourse, we won't. We did on that like you did on the first interrogatories.

Mr. Nourse: I now offer in evidence, your Honor, the answer to request for admission No. 19 made by the plaintiff to the defendant Home Indemnity Company, and with that offer Exhibit J attached to the request for admission, No. 18 reading:

"That the copy of the letter annexed hereto . . ."

The Court: 18. You referred to 19? [23]

Mr. Nourse: If I did, your Honor, I should have said 18.

The Court: All right.

Mr. Nourse: 19 will come next.

The Court: All right. Proceed.

Mr. Nourse: ". . . that the copy of the letter annexed hereto and marked Exhibit J is a full, true and correct copy of a letter written by John T. Holt to Thomas P. Menzies and received by Thomas P. Menzies."

The answer is that they admit that fact.

I shall now read to the court, if I may, so that the court will be advised, Exhibit J. This is on the letterhead of John T. Holt.

"Thomas P. Menzies,
"Attorney at Law,
"1014 Fidelity Building,
"548 South Spring Street,
"Los Angeles 13, California.

"Dear Mr. Menzies:

"Please find enclosed truthful answers verified by George White in the Fitzgerald vs George White case Michael Lee et al., vs. George White Case. Mr White has always cooperated and has been willing to do so. As you will remember, he has demanded of you on numerous occasions that you present to him the first statement you took from him to make corrections. You at all times have refused to do so. As you remember, he told you within twelve hours after the first statement that he had made to you that he remembered falling asleep and hav- [24] ing awakened while driving the car and that the accident could have happened then. If you will remember several days after this and a very short time after the accident itself, you and I talked by telephone and I asked you to

remember the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge. I merely wish to refresh your recollection about this matter, because I have offered myself as witness in this regard.

"Mr. White makes demand upon you to defend the above referred to cases. It is our understanding that it is the duty of your Company to defend Mr. White and the other defendant in the cases, and Mr. White expects you to do so.

"Very truly yours,
"John T. Holt."

I offer next the letter attached to the answers of the Home Indemnity to our request for admissions and which constitutes their reply to our request No. 19.

The Court: 18 is in evidence.

Mr. Nourse: I offer Exhibit A to the answer of Home Indemnity Company of New York to plaintiff's request for admissions, which is the following letter on the letter-head of Mr. Thomas P. Menzies. [25]

"Mr. John T. Holt,
"Attorney at Law,
"Suite 1114 San Diego Trust
"& Savings Building,
"San Diego 1, California.

"Dear Mr. Holt:

"This will acknowledge receipt of your letter of August 23rd, together with the enclosures. . . ."

The Court: What is the date of that letter?

Mr. Nourse: This letter is undated, your Honor; but it is referred to in the answer 19 as having been dated August 26th.

The Court: All right.

Mr. Nourse: The copy they attached was undated.

"This will acknowledge receipt of your letter of August 23rd, together with the enclosures.

"I am returning herewith the original answer in Lee against White, the original answer in Fitzgerald against White, and am retaining a copy for my files.

"Please be advised that the answer in Fitzgerald against White was due on the 22nd of August.

"I take it from your letter that you are now representing Mr. White in the above mentioned civil matters.

"I gather from your letter that your client has made inconsistent statements to you as well as to us and in view of all circumstances surrounding this matter, the Company denies liability in both of these cases." [26]

I now offer in evidence the Home's answer to the plaintiff's request for admission No. 25. No. 25 reads as follows—

The Court: 19 is in evidence.

Mr. Nourse: They were requested to admit the truth of the following:

"That the statement in said letter, marked 'Exhibit J,' herein, that:

"... several days after this . . ."

And this is the letter of August 23rd that I have read your Honor.

"... and a very short time after the accident itself, you and I talked by telephone and I asked you to remember

the conversation, which I am sure you do, at which time I reiterated over and over again that George White had stated to me and wanted it again relayed to you that he had fallen asleep at or near the scene of the accident and that he may have hit the people at that time without his knowledge.'

"is a true statement as to the facts related to you through your attorney, Thomas P. Menzies, Esq., over the telephone at the time indicated in the quoted statement."

To which they made reply to request No. 25:

". . . defendant admits that on or about July 29, 1946, said John T. Holt, in a telephone conversation with Thomas P. Menzies, attorney for defendant Home Indemnity Company, made [27] the statements referred to in said requests; that none of this defendant's agents, servants or employees were present at any conversation between John T. Holt and the defendant George White, and this defendant has no knowledge as to what, if anything, transpired between George White and John T. Holt."

The Court: In evidence.

The Clerk: That will be 20.

Mr. Nourse: I now offer in evidence plaintiff's request for admissions of the Home Indemnity, No. 26, which is as follows:

"That the defendant, Home Indemnity Company of New York, is now and has at all times since the 19th day of July, 1946, been solvent and financially able to pay the claims made against George White by plaintiffs in actions Nos. 134630 and 134918 in the Superior Court of the

State of California, in and for the County of San Diego, as set forth in the copies of the complaints in said actions, Exhibits C and F annexed hereto."

Those are the complaints that have already been received in evidence, your Honor.

The Court: What is the answer to that inquiry?

Mr. Nourse: And the answer to that request is:

"To request No. 26, this defendant admits the statements in said request contained."

The Court: In evidence. [28]

The Clerk: 26, is that, your Honor?

The Court: **26.**

Mr. Nourse: With that, your Honor, I think that concludes the plaintiff's case in chief and shows that White was driving an automobile upon which there was a policy of insurance, to wit, the Home's policy, when an accident occurred.

The claims have arisen that policy, against White, as to risks covered by the policy, to-wit, the liability incurred upon him by law for damages arising out of the use or operation of the Lincoln automobile. It proves that notice has been given to the Home and that the Home has denied liability.

The burden of proof undoubtedly under the decisions, your Honor (and I am glad to give them to you), is on the Home to plead and prove any breach of the conditions of the policy.

On that point, your Honor, I shall state now, as your Honor may want some assistance from counsel in the way of authorities, that it is the contention of the plaintiff—and may I speak for you gentlemen?—that not only must the Home show a breach, a technical breach, of the condition of the policy; but it must show that that was as to a

substantial matter materially affecting it, either in its decision whether or not to settle claims or to defend them or in the defense of the pending actions. And without that showing, [29] some showing that some defect or mis-statement of fact prejudiced it, it has no defense under the policy.

I will state to your Honor, frankly, that for many years we thought that was the law in this state. It was so announced as the law in the case of Hynding v. Home Accident Insurance Company, 214 Cal. 743, and it was followed as being a proper statement of the law in Pan-hens v. Associated Indemnity Company, 8 Cal. App. (2d) 532.

Does your Honor want the Pacific citations?

The Court: No, I do not have Pacific.

Mr. Nourse: And Norton v. Central Surety & Insurance Company, 9 Cal. App. (2d) 598; also Wormington v. The Associated Indemnity Company, 13 Cal. App. (2d) 321.

It was also followed by the Circuit Court of Appeals for the Ninth Circuit in the case of Western Casualty and Surety Co. v. Weimar, 96 Fed. (2d) 635.

However, in 1939 in the case of Valladao v. Firemen's Fund Insurance Company, 13 Cal. (2d) 322, the Supreme Court said that the language used in the—

The Court: Are you quoting the Supreme Court now in this opinion? You said "the Supreme Court said."

Mr. Nourse: The Supreme Court of California.

The Court: Said in the—

Mr. Nourse: In the Valladao case.

The Court: Said in California Appeals, yes. [30]

Mr. Nourse: That is its own decision in Hynding v. Home, that it was necessary to show prejudice was

obiter dicta, not necessarily the decision in this case but further said they still would not decide it. They said, "We don't need to decide it here because prejudice is present as a matter of law, and whether or not they have to prove it in order to establish a defense we will not decide."

And they have not decided. The Supreme Court of this state, except by inference in a case where I myself would assume it was against dicta—I don't believe I have that case in this memorandum, but I can give it to you at a later time—but I would also direct your Honor's attention to a Circuit Court case from this circuit which was decided in a case arising in Oregon, Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446. My reason for calling your Honor's attention to that is that the law here is in a state of flux, and it is going to be for your Honor to determine what the law of this state is and, I presume, from the law announced in other jurisdictions.

I should be glad to call your Honor's attention to a large number of cases from those jurisdictions if you desire.

The Court: It is about time for our afternoon recess, gentlemen.

(Brief recess.) [31]

Mr. Nourse: If your Honor please, the clerk and the reporter and counsel say that I have mixed up this record. I have gone over it with the clerk, and he has now Exhibits 1 to 11 which cover everything that we offered. That covers under one exhibit several interrogatories on several occasions, all dealings with the same subject matter which I offered. I think the clerk's record is correct now.

Mr. Luce, Mr. Watt checking, and I have gone over it with the clerk; and I think the clerk's record is correct.

The Court: All right. If we find anything to correct, gentlemen, later, of course we will have it corrected.

You may proceed, Mr. Menzies.

Mr. Menzies: May it please the court, before we proceed any further in this matter it may be that both Mr. Nourse and myself may be witnesses in this case, and I should like to inquire as to whether or not the court is going to invoke the rule as to both of us in so far as our participation in the trial is concerned?

The Court: There is no jury here, gentlemen. I can see no reason at all to exclude counsel from participating in the trial because they are going to give some testimony.

Mr. Menzies: Very well, your Honor.

The Court: I shall certainly permit the attorneys to present any information they desire under oath to the court, and I shall permit the attorneys to argue the matter fully, [32] even referring to their own testimony.

Mr. Menzies: Thank you. There is one other thing, too, your Honor. I take it from counsel's statements that inasmuch as the defendant Home Indemnity Company has the affirmative that we will have the right to open and close our argument?

Mr. Nourse: The affirmative of one issue only, your Honor. We have made a *prima facie* case, and they only now have the issue of establishing a defense. They are in no different position than in any other lawsuit where by their admissions of the pleadings and certain facts a *prima facie* case is proved with very little evidence. But it does not follow that because they have the burden of establishing a defense that that should be the situation.

and that is what it is, even though in this declaratory relief action they have the right to open and close.

The Court: It makes very little difference, gentlemen, where a matter is tried before the court. It makes a considerable difference in a matter tried before a jury as to the order in which arguments are made. However, it would seem to me that this is a declaratory action and the plaintiff has the right to open and close.

Mr. Menzies: That would be true, your Honor, were it not for the pleadings in this case. The pleadings as they now stand, and as I understand them, are in this condition: [33] that the plaintiff Standard Accident and the defendant Home Indemnity Company, in so far as the application of the evidence in this case, would be in the identical position. If the Home prevails in the action, then also the Standard Accident is relieved of any liability.

It is our contention here that they are in no different position than we are unless they are asserting that statements which were made by the defendant White are true and correct.

They have offered in evidence those statements, and they have placed in their pleadings here by their amendment a request for an adjudication, that in the event the court finds that those statements have been false and misleading that they would be relieved of liability.

That being the case, I can see no distinction between their position in this case and ours. We, therefore, would have, I take it, the duty of carrying forward, and in so doing we would have to assert the affirmative here and would have, as I understand the decisions, the right to open and close the case.

The Court: If you are both in the same position, I cannot have you both opening and both closing. It does not make any difference, gentlemen. I shall give you every opportunity to present everything that you have, and if you think of some other authorities after you leave, send a copy to opposing counsel and send it to me.

Mr. Menzies: All right, your Honor, thank you.

Mr. Nourse: I want one thing made clear. Mr. Menzies calls my attention to it. He is right: our positions are the same under certain circumstances.

We have, however, set up here and asked a declaration of the rights, first that the Home be held in because if they are held in we haven't anything in the fire.

I spoke to counsel for the other defendants and asked if they desired me to proceed to put on the *prima facie* case against the Home and if they would agree that by so doing I should not be estopped, should your Honor find that the Home's position is right here, from asserting that the Standard is also relieved and that they did so agree. Is that correct, gentlemen?

Mr. Lonergan: That is correct, your Honor. If I may be heard for a moment—

The Court: Yes.

Mr. Lonergan: —to point out our position on the point, your Honor.

The Court: You represent—

Mr. Lonergan: I represent the children, your Honor.

The Court: Yes.

Mr. Lonergan: Of the decedents.

The Court: All right. [35]

Mr. Lonergan: It is our position that if your Honor should find that the Home is released, that nevertheless the Standard Accident is not released, unless under the same

facts or whatever different facts may appear your Honor should also find that they are released. In other words, I believe that different facts apply to the defendant insurance companies.

I do not want to be put in the position of sitting silent while there is a statement made that they think that if one is released the other is released.

The Court: We will hear all the facts, gentlemen. I shall give you plenty of opportunity. Proceed.

Mr. Menzies: We expect to prove, your Honor, in this case, as indicated by Mr. Nourse, that an accident occurred on or about the 20th of July in the County of San Diego.

The Court: You will not have to prove that.

Mr. Menzies: That is true. But we will have to prove, and expect to prove, the facts and circumstances surrounding that accident.

The Court: All right.

Mr. Menzies: For the purpose of showing that not only was the statement as given to the Home Indemnity on the 23rd of July, 1946, misleading, but also that the subsequent correction was false and misleading.

We expect to prove both of those statements are misleading and false. [36]

As to the law that applies to the case, we would like to call your Honor's attention to this fact: that the policy was written and issued in the state of California.

I might ask counsel if they will stipulate to that fact. The policies are in evidence or on the pleadings, and they do show the place of issue.

Will you so stipulate?

Mr. Nourse: I will stipulate on the part of the plaintiff that both policies were written and issued in the state of California.

Mr. Menzies: And as to the other counsel?

Mr. Luce: Yes, we will so stipulate.

Mr. Lonergan: So stipulated.

Mr. Menzies: That being the case, we contend that the law of California applies to this particular litigation; and we also feel that under the authorities that the federal rule is the same.

The court will note in the Valladao case, which is reported in 13 Cal. (2d) 342, which Mr. Nourse cited to you, a quotation from the leading federal case on that subject, which is Buffalo v. U. S. Fidelity & Guaranty Company, and will be found in 84 Fed. (2d) at page 883.

There is also the Ocean Accident and Guaranty Corporation v. Lucas, 74 Fed. (2d) 115, which holds the same as the Buffalo case, that cooperation within a liability policy re- [37] quiring the insured to cooperate with the insurer means there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense.

"Wilful falsification of a material fact by the insured would violate the policy requiring insured to cooperate with insurer in all matters which the insurer deems necessary in the defense of the suit."

It is our contention here that the evidence will show that we still don't know from the defendant White what actually happened at this accident; that both of the statements are misleading and that if we were forced to defend the pending actions in San Diego County that we

would be faced with the situation of a defendant who had given us inconsistent statements and who, in addition thereto, had entered a plea of guilty to a charge of violation of Section 480 of the California Vehicle Code which is the California hit-and-run statute.

We expect that this evidence will show that an automobile traveling south on San Diego-Los Angeles Highway at or about the hour of 10:30 collided with two human beings, a man and a woman, Mr. and Mrs. Lee;

That that automobile prior to the collision was seen; that the brakes were applied to the car; that the noise of the application of the brakes was heard by several of the [38] witnesses; that the impact occurred at or about the same time as the application of the brakes; that the car slowed down but then went on its way; that thereafter at or near the city limits of San Diego in the County of San Diego a car was stopped, a Lincoln Zephyr sedan, by Officer Cassin of the San Diego Police Department;

That he stopped this car pursuant to a radio broadcast, and in seeking it coming down the highway noticed that the left front headlight was not burning;

That on stopping the car he found that the defendant White was operating the car and that there was no one else in the car;

That he questioned the defendant White as to where he received the damage to the car;

That the defendant told him that it had been received at the Santa Anita race track;

That he then took the defendant White to the San Diego police station;

That at no time between the time of the stopping of the car or until Officer Cassin and the defendant arrived

at the San Diego police station did the defendant get out of the car or evidence any interest in the damage to the left front fender or the headlight;

That there at the San Diego police station he again evidenced no interest in it but got out of the right-hand [39] side of the car and went into the police station and remained there;

That two officers' from the California Highway Patrol, Officer Hake and Officer McCreary arrived, conversed with the defendant, the defendant saw the car, saw the officers taking photographs of the car and he said to Officer Hake that he didn't know how the damage to the car had been sustained;

That he later entered a plea of guilty to a charge of violation of Section 480 of the Vehicle Code and was thereafter granted a hearing on an application for probation and at the hearing he made the same contention to the court there that has been made here: that he didn't know that he had hit anyone and that he must have been asleep and he might have hit them while he was asleep.

Those, briefly, your Honor, are the facts that we expect to prove in this case.

Pardon me. Mr. Watt calls my attention to something.

(Brief pause in the proceedings.)

Mr. Menzies: Not only is there the sworn statement which has been attached to the interrogatories, but also there was an oral statement substantially the same as the sworn statement that was transcribed by Mr. Whitcomb, the court reporter.

At this time we would like to offer in evidence all of [40] the interrogatories, those requested by the plaintiff of the defendant, and ask that they be marked as Defendant's Exhibit—what would that be, Mr. Cross?

The Clerk: "A."

Mr. Menzies: "A."

Mr. Nourse: To which, your Honor, we object on the ground that those are self-serving answers to interrogatories, not being requests for admissions. They cannot be offered by the party who answered the interrogatories.

They are incompetent and irrelevant to prove any issue in this case.

The Court: They can be used for impeachment.

Mr. Nourse: But they are offering their own answers to interrogatories as proof of those facts. That is not competent evidence. It is so stated in the rules.

The Court: At this time I shall deny it and give you opportunity before the close of the case to offer it. It will develop in the testimony.

Mr. Menzies: Then I will offer as Exhibit A, your Honor, the reservation of rights which was attached to the defendant Home's reply to the interrogatories.

Mr. Nourse: Right there, your Honor, I call your attention to the fact that that was directed to us alone, and our answer to it said that we did not know it; we had never seen it. And since then I will say to your Honor I have talked to [41] Mr. White and his memory of signing it is very faint, and I think that the testimony should be offered to show the surrounding circumstances of the signing of that instrument.

It certainly could not be introduced on our admission because we only admitted it upon the statement that counsel had told us it had been signed.

Mr. Menzies: You had the order of the court directing you to do so.

The Court: Well, I shall deny that at this time. As I say, I shall permit you to reopen and make the offer at the close of the case if I find that justice requires it.

Mr. Menzies: Very well, sir. We will offer in evidence at this time the defendant Home's interrogatories addressed to the plaintiff and the replies of the plaintiff thereto and ask that they be marked as Exhibit A.

The Court: Same ruling.

Mr. Menzies: And we will offer the answers of the Standard Accident to those interrogatories and ask that they be marked in evidence.

Mr. Nourse: No objection on plaintiff's part. I cannot speak for the others.

Mr. Luce: Of course, they are not binding, if your Honor please, upon the defendant White.

The Court: What is your position, Mr. Lonergan?

Mr. Lonergan: The same as the defendant White, your [42] Honor; they are not binding on us.

The Court: In evidence.

Mr. Menzies: They have been received?

The Court: Yes.

Mr. Menzies: That is, they are marked Exhibit A?

The Court: Yes.

(The documents referred to were received in evidence and marked Defendant's Exhibit A.)

Mr. Menzies: Mr. Briggs, will you take the stand, please?

HENRY T. BRIGGS,

called as a witness by and in behalf of the defendant Home Indemnity Company, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Henry T. Briggs.

The Clerk: Is that B-r-i-g-g-s?

The Witness: That's right.

Direct Examination.

By Mr. Menzies:

Q. What is your business or occupation, Mr. Briggs?

A. I am an automobile mechanic.

Q. Where are you employed?

A. Well, at the time of the accident I was located in Leucadia, California, but I am now in Encinitas. [43]

Q. Now, directing your attention to on or about the 20th day of July, 1946, did you witness an accident at or near Solano Beach in the County of San Diego?

A. Yes, I did.

Q. Were you in an automobile at that time?

A. Yes.

Q. Or were you a pedestrian?

A. I was in an automobile.

Q. What kind of automobile were you driving?

A. A 1946 Plymouth.

Q. In which direction were you traveling and on what road?

A. I was on Highway 101 going towards Los Angeles, north.

Q. What time of the day or night was it?

A. Oh, it was around a little after 10:00.

(Testimony of Henry T. Briggs)

Q. By Mr. Menzies: Now, which did you hear first: the thud or the screech of the brakes?

A. Well, it was like a thud, then screech and he went on and I figured—

The Court: Not what you figured, just what you saw, just what you heard.

The Witness: Well, when the body came rolling towards me I just pulled off the side of the road and got out of my car, and I—I have to figure something here.

Q. By Mr. Menzies: Can you describe the noise there at the scene of the accident?

A. Well, it all happened so fast that I just seen them get hit and the people come rolling towards me, and I just pulled off the road.

Q. What did you hear there?

A. A thud and a squeal of brakes.

Q. Can you describe whether that was a loud or a dull thud, or what?

A. Well, it wasn't loud, but it was loud enough so I could hear it.

Q. 175 feet away? A. Yes. [47]

Q. Was there other traffic?

Mr. Nourse: Just a moment. The witness did not testify he was 175 feet away when the accident occurred, I don't believe, your Honor.

The Court: That is the way I have it in my notes.

Mr. Nourse: That is when he first saw the people.

The Court: Let us clear it up. Do you understand the difficulty here?

The Witness: Yes, I see.

The Court: How far, now, was the car that was coming towards you from the north?